No. 96-8400-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
March 27, 1997

Title: Douglas McArthur Buchanan, Jr., Petitioner
v.
Ronald J. Angelone, Director, Virginia Department of Corrections, et al.

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Zerkin,Gerald T.

Counsel for respondent: Baldwin,Katherine P.

Entry	Date	Note	Proceedings and Orders
1	Mar 27 1997	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 26, 1997)
3	Apr 1 1997	X	Brief of respondent Ronald Angelone, Director in opposition filed.
4	Apr 1 1997	D	Application (A96-695) for a stay of execution pending the disposition of the petition for a writ of certiorari, submitted to The Chief Justice.
5	Apr 4 1997	X	Reply brief of petitioner filed.
6	Apr 7 1997		Application (A96-695) referred to the Court by the Chief Justice.
10	Apr 8 1997		(A96-695) Application for stay of execution of sentence of death presented to the Chief Justice and by him referred to the Court is granted pending the disposition by this Court of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.
11	Apr 10 1997		DISTRIBUTED. April 23, 1997 (Page 10)
13	Apr 28 1997		Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT November 3, 1997. **********
15	May 5 1997	G	Motion of petitioner for appointment of counsel filed.
14	May 12 1997		DISTRIBUTED. May 15, 1997 (Page 13)
16	May 19 1997		Motion for appointment of counsel GRANTED and it is ordered that Gerald T. Zerkin, Esquire, of Richmond, Virginia, is appointed to serve as counsel for the petitioner in this case.
18	Jun 6 1997		Order extending time to file brief of petitioner on the merits until June 26, 1997.
19	Jun 26 1997		Joint appendix filed.
21	Jun 26 1997		Brief of petitioner Douglas McCarthur Buchanan filed.
20	Jun 30 1997	G	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
23	Jul 10 1997		Order extending time to file brief of respondent on the merits until August 15, 1997.
25	Aug 15 1997		Brief of respondent Ronald Angelone, Director filed.

2 pp

No. 96-8400-CFH

Entry	Date	Note	Proceedings and Orders
26	Aug 15 1997		Brief amicus curiae of Criminal Justice Legal Foundation filed.
27	Sep 12 1997		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae GRANTED.
28	Sep 16 1997		CIRCULATED.
29	Sep 17 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit.
30	Oct 24 1997		Record filed.
		*	Original record proceedings U. S. District Court for the Western District of Virginia (BOX).
31	Oct 27 1997		Record filed.
		*	Original record proceedings Amherst County Circuit Court (BOX).
32	Nov 3 1997		ARGUED.

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

96-8400

No.

Supreme Court, U.S.
FILED
1997
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RECEIVED
MAR 27 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DOUGLAS MACARTHUR BUCHANAN, JR.
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent,

On Petition for a Writ of Certiorari
United States Court of Appeals
for the Fourth Circuit

APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
April 8, 1997

Gerald T. Zerkin
GERALD T. ZERKIN &
ASSOCIATES
530 E. Main, Suite 800
Richmond, VA 23219
(804) 788-4412

9 pp

TO: THE HONORABLE WILLIAM H. REHNQUIST
CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

Petitioner Douglas MacArthur Buchanan, by counsel, applies to this Court pursuant to 28 U.S.C. § 2251 for a stay of his execution, currently scheduled for April 8, 1997, and states as follows:

1. On December 30, 1996, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's order denial of Buchanan's first petition for a writ of habeas corpus. Buchanan filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on January 27, 1997. The mandate was issued on February 5, 1997. On February 10, 1997, the Circuit Court of the County of Amherst issued an order directing that Buchanan be executed on April 8, 1997. The Order is attached to this Application as Exhibit A.

2. Buchanan seeks an Order from this Court for a stay of execution pursuant to 28 U.S.C. § 2251, which provides:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

3. This Court's power to stay petitioner's execution is clear, and stays of execution have regularly been granted by this Court to death sentenced state prisoners pending a timely resolution of their federal constitutional claims. See, e.g., O'Dell v. Netherland, 117 S.Ct. 631 (1996), Gray v. Netherland, 116 S.Ct. 687 (1995), Grubbs v. Delo, 113 S.Ct. 395 (1992) (Blackmun, J., Circuit Justice).

2. Buchanan asks this Court to stay his presently scheduled execution both to permit him to prepare an adequate petition for writ of certiorari and to afforded the United States Supreme Court the time to consider that petition in a thoughtful manner.

3. A stay of execution is necessary to resolve the serious constitutional issues presented by this case, and this Court should grant a stay of execution in order to permit a timely disposition of this death-sentenced prisoner's federal claims. A stay of execution pending the filing of a petition for certiorari should be granted if, a) it is reasonably probable that four members of the Supreme Court will consider the underlying issue sufficiently meritorious for a grant of certiorari, b) there is a significant possibility that the appellate court's decision will be reversed, and c) irreparable harm is likely to result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Petitioner's case satisfies all of these criteria.

4. Petitioner raises substantial questions of constitutional law. These questions include:

(a) whether, in a non-weighing state, an instruction which merely stated "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment," is adequate to satisfy this Court's Eighth Amendment jurisprudence which compels sentencing juries to consider and give effect to evidence in mitigation, and which requires that juries be carefully guided and instructed in their decisionmaking; and

(b) whether in a state that has identified statutory mitigating circumstances, the Due Process Clause requires that a capital sentencing jury be apprised of their existence as the

factors that the state has deemed particularly relevant to sentencing

(c) whether an interpretation of Green v. Georgia, 442 U.S. 95 (1979), which limits it specifically to its facts, and prevents the hearsay testimony of an expert witness who partly based his opinion on extensive interviews with people who knew the defendant, violates Green, Chambers v. Mississippi, 410 U.S. 284, 302 (1973), and the rule of Montana v. Egelhoff, 116 S.Ct 2013 (1996).

8. Buchanan will be irreparably harmed if he must petition for certiorari and this Court is forced to resolve the compelling issues presented by his case on a truncated or highly expedited schedule.

9. A stay of execution would permit the parties a full opportunity to be heard on the issues raised by Buchanan and to allow for proper review by this Court.

WHEREFORE, for the reasons set forth herein, Buchanan requests that this Court grant a stay of execution.

Dated:

Respectfully submitted,

Gerald T. Zerkin
Gerald T. Zerkin & Associates
530 E. Main Street, Suite 800
Richmond, VA 23219
(804) 788-4412

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY FEB 10 1997

COMMONWEALTH OF VIRGINIA,

v. **Case Nos. 5784, 5947 & 5948**

DOUGLAS MCARTHUR BUCHANAN,

Defendant.

ORDER

This day came the Commonwealth, by its attorney, and the defendant, by counsel, to be heard upon the Commonwealth's Motion to set an execution date pursuant to § 53.1-232.1(iii) of the Code of Virginia. Having determined that the Commonwealth's motion should be granted, it hereby is ORDERED that the death sentence of Douglas McArthur Buchanan be carried out on the 8th day of April, 1997, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before the date of execution, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

APPENDIX
A

Gerald T. Zerkin, Esquire
530 East Main Street, Suite 800
Richmond, Virginia 23219

The Honorable W. Edward Meeks, III
Commonwealth's Attorney for Amherst County
P.O. Box 358
Amherst, Virginia 24521

Katherine P. Baldwin
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 10th day of Feb., 1997.

J. Samuel Johnston, Jr.
Judge

A copy,
Teste: Roy C. Mayo, III, Clerk
ROY C. MAYO, III
Clerk Circuit Court Amherst County, Va.

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 1997, I caused the foregoing Application for a Stay of Execution to be served by hand delivery on Katherine P. Baldwin, Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

Gerald T. Zerkin

type of spontaneous (and therefore reliable) confession from a third party that exculpated the petitioners in Chambers and Green.

The complete lack of any constitutional violation is only underscored by the fact that the ***trial judge repeatedly offered to continue the hearing and to summons the witnesses whose hearsay was being offered.*** (JA 128-129, 137-138, 141). This offer to allow Buchanan essentially the unfettered ability to present any evidence in mitigation also distinguishes this case from Chambers and Green, where the defendants were prevented from presenting crucial evidence. Defense counsel, however, refused all such offers from the trial judge, stating as follows:

> I don't want to do that, Judge. ***We have enough***. I just want to object to your not allowing [the hearsay] in.

(JA 138, emphasis added). Of course, "enough" was an understatement. In addition to the evidence discussed above, the trial court permitted the doctor to rely on his conferences with other doctors involved in the case (JA 141-142), on accepted treatises (JA 130), as well as on "school records or similar type records." (JA 159). Certainly, an evidentiary ruling that Buchanan was given the opportunity to avoid cannot be said to rise to the level of a due process violation of the Constitution.

Significantly, the factual bases for Dr. Brown's opinions were not in dispute. The Commonwealth's experts, Drs. Lee and Gwaltney, relied to some extent on Dr. Brown's evaluation describing Buchanan's upbringing, background and the various tests he had performed, and generally agreed that Buchanan had suffered a deprived and abused childhood. (JA 231, 232-233; Tr. 1510; JA 236, 238). The record, therefore, not only dispels Buchanan's claim of constitutional error, but renders any conceivable error utterly harmless. See Brecht v.

No. 96-8400

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Supreme Court, U.S.
FILED
1997
OFFICE OF THE CLERK

DOUGLAS McARTHUR BUCHANAN,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, et al.

Respondents.

PETITIONER'S CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on April 3, 1997, I faxed and mailed a copy of this document to Katherine P. Baldwin, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.

Gerald T. Zerkin

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

No. 96-8400

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DOUGLAS MACARTHUR BUCHANAN, JR.
Petitioner,

v.

RONALD J. ANGLEONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent,

RECEIVED
MAR 27 1997
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SUPREME COURT, U.S.

On Petition for a Writ of Certiorari
United States Court of Appeals
for the Fourth Circuit

APPENDICES A-D

Imminent Execution Scheduled
April 8, 1997

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*counsel of record

129pp

Copr. (C) West Group No claim to orig. U.S. govt. work
103 F.3d 344
(Cite as: 103 F.3d 344)

Douglas McArthur BUCHANAN, Jr., Petitioner-Appellant,
v.
Ronald J. ANGELONE, Director, Virginia Department of Corrections; Commonwealth of Virginia, Respondents-Appellees.
No. 96-4.

United States Court of Appeals,
Fourth Circuit.
Argued Oct. 30, 1996.
Decided Dec. 30, 1996.

After convictions for capital murder, three first-degree murders, and firearm offenses were affirmed, 238 Va. 389, 384 S.E.2d 757, petitioner sought writ of habeas corpus. The United States District Court for the Western District of Virginia, James C. Turk, J., denied petition. Petitioner appealed. The Court of Appeals, Butzner, Senior Circuit Judge, held that: (1) sentencing instruction in capital case did not violate Eighth Amendment by not instructing jury about specific mitigating factors supported by evidence; (2) nonspecific instruction on mitigating evidence was consistent with state sentencing statute; (3) exclusion of hearsay testimony offered by defendant's expert during sentencing hearing did not violate defendant's right to present mitigating evidence; (4) pleading guilty to murder charges would not have barred further prosecution, under double jeopardy principles, of capital charges against defendant arising in same prosecution; (5) petitioner failed to show that his constitutional rights were violated on ground that state Supreme Court's review was inadequate; and (6) petitioner failed to meet exhaustion requirement for claim that trial court's refusal to instruct on second-degree murder violated due process.

Affirmed.

[1] CRIMINAL LAW k1213.7
110k1213.7
Sentencing instruction in capital case, informing jury that it was required to impose life imprisonment if it did not believe that death penalty was justified, did not violate Eighth Amendment by not instructing jury about specific mitigating factors supported by evidence, when jury, in its verdict, certified that it had considered evidence in mitigation of offense, as required by Virginia law. U.S.C.A. Const.Amend. 8; Va.Code 1950, s 19.2-264.4.

[1] HOMICIDE k311
203k311
Sentencing instruction in capital case, informing jury that it was required to impose life imprisonment if it did not believe that death penalty was justified, did not violate Eighth Amendment by not instructing jury about specific mitigating factors supported by evidence, when jury, in its verdict, certified that it had considered evidence in mitigation of offense, as required by Virginia law. U.S.C.A. Const.Amend. 8; Va.Code 1950, s 19.2-264.4.

[2] CRIMINAL LAW k1213.7

APPENDIX
A

110k1213.7
Eighth Amendment requires that capital sentencing jury's discretion be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of death penalty, thus eliminating total arbitrariness and capriciousness in its imposition; to accomplish this purpose, capital sentencing jury must be properly instructed. U.S.C.A. Const.Amend. 8.

[2] CRIMINAL LAW k1213.8(8)
110k1213.8(8)
Eighth Amendment requires that capital sentencing jury's discretion be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of death penalty, thus eliminating total arbitrariness and capriciousness in its imposition; to accomplish this purpose, capital sentencing jury must be properly instructed. U.S.C.A. Const.Amend. 8.

[3] CRIMINAL LAW k1213.7
110k1213.7e imprisonment if it did not believe that death penalty was justified, was consistent with Virginia sentencing statute, which did not impose obligation to instruct jury about specific mitigating factors; instruction thus did not violate defendant's federal due process rights. U.S.C.A. Const.Amend. 14; Va.Code 1950, s 19.2-264.4.

[4] HOMICIDE k311
203k311
Nonspecific mitigation sentencing instruction in capital case, which informed jury that it was required to impose life imprisonment if it did not believe that death penalty was justified, was consistent with Virginia sentencing statute, which did not impose obligation to instruct jury about specific mitigating factors; instruction thus did not violate defendant's federal due process rights. U.S.C.A. Const.Amend. 14; Va.Code 1950, s 19.2-264.4.

[5] CONSTITUTIONAL LAW k270(1)
92k270(1)
In context of discretionary sentencing by jury, denial of state procedural right may rise to level of federal due process violation. U.S.C.A. Const.Amecomplete. emotional stress in committing murders, and thus were cumulative, defendant rejected trial court's offer to continue case and summon declarants, and excluded statements lacked inherent reliability. U.S.C.A. Const.Amend. 14.

[6] HOMICIDE k358(1)
203k358(1)
Exclusion of hearsay testimony offered by defendant's expert during sentencing hearing in capital case did not violate defendant's due process right to present mitigating evidence; compelling circumstances mandating admission of hearsay did not exist, in that statements were offered only to provide additional support for expert's conclusion that defendant acted under extreme emotional stress in committing murders, and thus were cumulative, defendant rejected trial court's offer to continue case and summon declarants, and excluded statements lacked inherent reliability. U.S.C.A. Const.Amend. 14.

[7] CRIMINAL LAW k641.13(5)

110k641.13(5)
Pleading guilty to four first-degree murder charges would not have barred further prosecution, under double jeopardy principles, of capital charges against defendant arising in same prosecution, even though defendant was charged with murders and capital murder in separate indictments; therefore, counsel was not incompetent for failing to recommend this course of action, so as to permit defendant to avoid death penalty, nor was defendant prejudiced by pleading not guilty. U.S.C.A. Const.Amends. 5, 6.

[7] DOUBLE JEOPARDY k167
135Hk167
Pleading guilty to four first-degree murder charges would not have barred further prosecution, under double jeopardy principles, of capital charges against defendant arising in same prosecution, even though defendant was charged with murders and capital murder in separate indictments; therefore, counsel was not incompetent for failing to recommend this course of action, so as to permit defendant to avoid death penalty, nor was defendant prejudiced by pleading not guilty. U.S.C.A. Const.Amends. 5, 6.

[8] CONSTITUTIONAL LAW k271
92k271
Capital defendant failed to show that his due process and Eighth Amendment rights were violated on ground that state Supreme Court's review was inadequate, in that it failed to consider mitigating evidence, when state Supreme Court conducted mandatory statutory review and engaged in independent review of the record, by which it necessarily became aware of mitigating evidence that defendant presented, and when federal district court conducted own independent review of the record, specifically taking mitigating evidence into account, and concluded that death penalty had not been imposed arbitrarily. U.S.C.A. Const.Amends. 8, 14; Va.Code 1950, s 17-110.1, subd. C, par. 1.

[8] CRIMINAL LAW k1208.1(6)
110k1208.1(6)
Capital defendant failed to show that his due process and Eighth Amendment rights were violated on ground that state Supreme Court's review was inadequate, in that it failed to consider mitigating evidence, when state Supreme Court conducted mandatory statutory review and engaged isarily became aware of mitigating evidence that defendant presented, and when federal district court conducted own independent review of the record, specifically taking mitigating evidence into account, and concluded that death penalty had not been imposed arbitrarily. U.S.C.A. Const.Amends. 8, 14; Va.Code 1950, s 17-110.1, subd. C, par. 1.

[8] CRIMINAL LAW k1213.7
110k1213.7
Capital defendant failed to show that his due process and Eighth Amendment rights were violated on ground that state Supreme Court's review was inadequate, in that it failed to consider mitigating evidence, when state Supreme Court conducted mandatory statutory review and engaged in independent review of the record, by which it necessarily became aware of mitigating evidence that defendant presented, and when federal district court conducted own independent review of the record, specifically taking mitigating evidence into account, and concluded that death penalty had not been imposed arbitrarily. U.S.C.A. Const.Amends. 8, 197k366
Habeas corpus petitioner failed to meet exhaustion requirement for claim that trial court violated his federal due process rights by refusing to instruct on second-degree murder when he failed to raise issue in direct appeal to state Supreme Court. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. s 2254.

[14] HABEAS CORPUS k312
197k312
Failure of federal habeas corpus petitioner to raise federal claim in state court bars federal review of omitted claim. 28 U.S.C.A. s 2254.

*346 ARGUED: Gerald Thomas Zerkin, Gerald T. Zerkin & Associates, Richmond, VA, for Appellant. Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Richmond, VA, for Appellees. ON BRIEF: Donald R. Lee, Virginia Capital Representation Resource Center, Richmond, VA; Frank K. Friedman, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, VA, for Appellant. James S. Gilmore, III, Attorney General of Virginia,ies, he petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. s 2254. In his petition, he alleged numerous constitutional defects in the state court proceedings. The district court denied the petition. On appeal, Buchanan presents five issues for review. After careful consideration of his contentions and the record, we find no reversible error and affirm the district court's disposition.

I

On the afternoon of September 15, 1987, Buchanan murdered his father, his stepmother, and his two half brothers. The Virginia Supreme Court's opinion recounts the details of the crime. Buchanan v. Commonwealth, 238 Va. 389, 394-96, 384 S.E.2d 757, 760-61 (1989).

Buchanan was charged with capital murder for the killing of "more than one person as part of the same act or transaction." Va.Code Ann. s 18.2- 31(7) (Michie 1996). In four separate indictments, the grand jury also charged him with the first degree murder of each victim. In ad and to a term of imprisonment for the firearm offenses. The circuit court imposed the recommended sentences.

Buchanan appealed to the Supreme Court of Virginia. The court vacated the redundant conviction of first degree murder for the killing of Buchanan's father and affirmed the other convictions and the related sentences, including the death penalty. Buchanan, 238 Va. at 418, 384 S.E.2d at 774. The United States Supreme Court denied certiorari. Buchanan v. Virginia, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990).

Buchanan then petitioned for a writ of habeas corpus in the Circuit Court of Amherst County. After the circuit court dismissed his petition, he appealed to the Supreme Court of Virginia, which also denied the petition. The United States Supreme Court again denied certiorari. Buchanan v. Murray, 506 U.S. 988, 113 S.Ct. 501, 121 L.Ed.2d 437 (1992).

Buchanan sought a writ of habeas corpus in federal district court, which denied relief. On appeal, Buchanan now asserts five claims, one relating to the competence of his trial counsel, three alleging errors in his trial, and one challenging the adequacy of the Virginia Supreme Court's appellate review.

II

[1] Buchanan's first claim is that the sentencing jury was inadequately instructed about mitigating evidence. With regard to mitigation, the court told the jury: "[I]f you believe from

all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment." In addition, the statutory verdict form required the jury to indicate that it had "considered the evidence in mitigation of the offense."

At trial Buchanan asked the court to give a more detailed instruction on mitigation. Specifically, he asked the court to tell the jury that it should consider as mitigating factors his youth, his clean criminal record, and whether he was "under the influence of extreme mental or emotional disturbance" when he committed the crime. Each of these factors is designated as mitigating evidence by Virginia Code s 19.2-264.4 (Michie 1996). During the sentencing hearing Buchanan submitted evidence supporting each factor, and Buchanan's counsel was permitted to discuss the factors in his closing argument.

Buchanan now argues that the trial court's failure to instruct the jury about the specific mitigating factors supported by his evidence violated his constitutional rights in two ways. His first argument rests on the Eighth Amendment. In his view, the trial court's nonspecific instruction did not appropriately channel the jury's discretion so as to avoid an arbitrary or capricious outcome.

[2][3] The Eighth Amendment requires that a capital sentencing jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). To accomplish this purpose, a capital sentencing jury must be properly instructed. Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). However, the Eighth Amendment does not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 2749- 50, 77 L.Ed.2d 235 (1983).

Guided by those constitutional principles, this court has previously analyzed and rejected the argument now asserted by Buchanan. In Clozza v. Murray, we held that Virginia's death penalty scheme survives constitutional scrutiny, despite its "failure to instruct the jury on statutory mitigating factors." 913 F.2d 1092, 1105 (4th Cir.1990). In addition, this court has reviewed and approved the constitutionality of jury instructions, used in other Virginia death penalty cases, that were essentially identical to the instructions contested in this case. Jones v. Murray, 947 *348 F.2d 11t it had "considered the evidence in mitigation of the offense." In Jones, we concluded that "[b]y allowing the jury to consider all relevant mitigating evidence, [Virginia's sentencing] procedure ... satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases." 947 F.2d at 1120. In light of this precedent, Buchanan's Eighth Amendment claim must fail.

[4] Buchanan's second argument asserts a federal due process violation. According to Buchanan, the trial court's nonspecific mitigation instruction was inconsistent with Virginia's death penalty sentencing statute and, as a result, denied him the benefit of the Commonwealth's statutory sentencing scheme. Buchanan argues that this alleged violation of state law infringed his rights under the Due Process Clause.

[5] It is true, at least in the context of discretionary sentencing by a jury, that denial of a state procedural right may rise to the level of a federal due process violation. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229 30, 65 L.Ed.2d 175 (1980). However, there was no such violation in Buchanan's case because, contrary to his assertion, the trial court's instruction was consistent with the senttute is consistent with the Virginia Supreme Court's interpretation. It is clear from that court's decisions that the statute does not require the trial court to list specific mitigating circumstances. See, e.g., LeVasseur v. Commonwealth, 225 Va. 564, 594-95, 304 S.E.2d 644, 661 (1983). Because the jury instructions in this case were consistent with the sentencing statute, Buchanan's due process argument must also fail.

III

[6] The second claim advanced by Buchanan is that the trial court impermissibly limited his ability to present mitigating evidence at the sentencing hearing. This claim is based on the trial court's exclusion of hearsay testimony offered by Buchanan's expert witness, Dr. Robert Brown.

Dr. Brown was Buchanan's principal mitigation witness. In preparation for trial, he performed a psychological evaluation of Buchanan and extensively investigated his personal and family history. As part of his investigation, he interviewed many of support for his position, he relies on Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

Based on the "unique circumstances" present in Green, the Court held that Georgia's admittedly proper application of its hearsay rule during the sentencing phase of a death penalty trial violated the Due Process Clause. 442 U.S. at 95-97, 99 S.Ct. at 2150-52. In that case, the trial court excluded an out-of-court statement of a man who had already been convicted of capital murder for his role in the killing for which the defendant was being tried. The excluded statement, made spontaneously to a close friend, amounted to an admission that the declarant *349 alone was responsible for the killing. The Court found that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [citation omitted], and substantial reasons existed to assume its reliability." Id. at 97, 99 S.Ct. at 2151. Under those circumstances, the Court held that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' " Id. at 97, 99 S.Ct. at 2151-52 (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)).

The exclusion of the hearsay statements offered by Dr. Brown does not fit within the narrow exception recognized by Green. In Green, the excluded statement strongly tended to show that the defendant was innocent. In this case, the statements were offered only for the purpose of providing additional support for Dr. Brown's conclusion that Buchanan acted under extreme emotional stress. Even without the proffered statements, Dr. Brown's testimony provided ample evidence to explain his opinion. For this reason, the statements would have had only cumulative probative value. After the trial court offered to continue the case and summon the relatives and friends whom Dr. Brown interviewed, Brown's attorney said: "I don't want to do that Judge. We have enough. I just want to object to your not allowing it in."

The excluded statements also lack the inherent reliability of the statement excluded in Green. The statement in Green was against the declarant's penal interest, made spontaneously to a close friend, and the state itself had relied on the excluded testimony to convict the declarant of capital murder. At Buchanan's trial, these compelling circumstances do not appear.

The evidence in this case discloses that the application of Virginia's hearsay rule did not rise to the level of a constitutional violation.

IV

[7] Buchanan's third claim is that his trial counsel was ineffective because he failed to take advantage of what Buchanan sees in retrospect as a certain opportunity to have avoided a death sentence. Buchanan contends that, if he had pleaded guilty to the four first degree murder indictments, the constitutional guarantee against double jeopardy would have precluded any further prosecution based on the same killings. This means, he argues, that the Commonwealth could not have prosecuted the capital murder indictments. Because Buchanan's sole objective

throughout the criminal proceeding was to avoid the death penalty, he claims that his trial counsel's failure to recognize this opportunity deprived him of his Sixth Amendment right to counsel.

Contrary to Buchanan's assertion, pleading guilty to the first degree murder indictments would not have precluded the Commonwealth from prosecuting the capital charges. The Supreme Court addressed a nearly identical issue in Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984). In that case, the defendant pleaded not guilty to the murder and aggravated robbery charges against him and, at the same time, pleaded guilty to the lesser included offenses of involuntary manslaughter and grand theft. The trial court accepted the guilty pleas, sentenced the defendant, and then dismissed the murder and aggravated robbery charges on double jeopardy grounds. Id. at 494, 104 S.Ct. at 2538. On appeal, the Supreme Court of Ohio affirmed. The Supreme Court of the United States reversed, holding that pleading guilty to the lesser included offenses did not bar the state from prosecuting the greater offenses since all of the charges were brought in a single prosecution. Id. at 497-502, 104 S.Ct. at 2539-43.

Buchanan asserts that Johnson is inapplicable. He points out that in Johnson all of the charges were brought in a single indictment. In this case, on the other hand, Buchanan was charged with first degree murder and capital murder in separate indictments.

The distinction drawn by Buchanan would not have made any difference. In Johnson, the Court found that permitting the state to pursue the greater charges, even after the defendant pleaded guilty to the lesser charges, did not implicate any of the interests protected by the Double Jeopardy Clause. The Court noted that, by pleading ***350** guilty to the lesser included offenses, the defendant "has not been exposed to conviction completing its prosecution on the remaining charges." Id. at 502, 104 S.Ct. at 2542. While it is true that Johnson involved a single indictment with multiple counts, the Court's reasoning applies equally to a case involving multiple indictments brought in a single prosecution. By itself, the fact that the Commonwealth charged Buchanan in separate indictments does not constitute the type of "governmental overreaching that double jeopardy is supposed to prevent." Id. at 502, 104 S.Ct. at 2542.

Buchanan argues that, under Virginia law, he had an absolute right to plead guilty at any time to the entirety of any indictment against him. He relies on Graham v. Commonwealth, 11 Va.App. 133, 137-40, 397 S.E.2d 270, 273 (1990), but his reliance is misplaced. The Virginia Court of Appeals explained that a plea of guilty to a lesser included offense would not bar prosecution of a greater offense pending in the same prosecution: The only discretion given to a court by the statute is the right toquent case. The Virginia Court of Appeals held that pleading guilty to a first degree murder indictment does not preclude the simultaneous prosecution of a capital murder indictment involving the same transaction. Rea v. Commonwealth, 14 Va.App. 940, 943-45, 421 S.E.2d 464, 466-68 (1992) (relying on Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425).

Against this background, it is evident that Buchanan's right to counsel was not violated. The Sixth Amendment right to counsel guarantees effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984). In order to establish deprivation of this right, a criminal defendant must show both that counsel acted incompetently and that counsel's incompetence was prejudicial. Id. at 687, 104 S.Ct. at 2064.

Because there was no reason to believe that pleading guilty to the first degree indictments would have barred prosecution of the capital charges, the failure of Buchanan's counsel to recommend this course of action cannot be labelled incompetent. Additionally, since Buchanan could not have blocked prosecution of the capital charges by pleading guilty to the lesser included offenses, pleading not guilty did not prejudice him. For these reasons, we reject Buchanan's argument that his counsel was ineffective.

V

[8] Next, Buchanan asserts that the Virginia Supreme Court's review of his case was constitutionally inadequate in two respects. First, he alleges that the court failed to consider the mitigating evidence he offered. Second, he claims that the court did not conduct the proportionality review required by Virginia statute in a rational manner. He argues the first deficiency violated both his due process and Eighth Amendment rights, while the second violated his due process rights. According to Buchanan, the federal due process violations arise because the Virginia Supreme Court improperly implemented the pertinent state statute.

[9][10] The Eighth Amendment requires that the death penalty not be imposed in an arbitrary or capricious manner. Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). Meaningful appellate review is an important safeguard against improper imposition of the death penalty. Parker v. Dugger, 498 U.S. 308, 321, 111 S.Ct. 731, 739-40, 112 L.Ed.2d 812 ***351** (1991). Consistent with those constitutional requirements, Virginia law directs the Commonwealth's highest court to review the record in every death penalty case to determine whether the sentence was "imposed under the influence of passion, prejudice or any other arbitrary factor." Va.Code Ann. s 17-110.1.C.1 (Michie 1996).

[11] The Virginia Supreme Court conducted the mandatory statutory review in this case. The court engaged in an "independent review of the record." By doing so, the court necessarily became aware of the mitigating evidence Buchanan had presented.al [ed] nothing to suggest that the death penalty was imposed ... as the result of passion, prejudice, or arbitrariness." Buchanan, 238 Va. at 418, 384 S.E.2d at 774. On collateral review, federal courts are not required to re-examine a state court's good faith findings. Cf. Walton, 497 U.S. at 656, 110 S.Ct. at 3058-59. Moreover, the district court conducted its own independent review of the record and, after specifically taking Buchanan's mitigating evidence into account, concluded that the death penalty had not been imposed arbitrarily. For these reasons, Buchanan cannot prevail on this point.

[12] Also without merit is Buchanan's claim that the Virginia Supreme Court's proportionality review was inadequate. Although the Virginia capital sentencing statute requires a proportionality review, Virginia Code s 17- 110.1.C.2, the federal Constitution does not. Pulley v. Harris, 465 U.S. 37, 50-51, 104 S.Ct. 871, 879-80, at 769-71 (citing Virginia cases). Buchanan, however, did not contend in his direct appeal to the Virginia Supreme Court that the omitted instruction violated federal due process. As a result, the district court properly concluded that Buchanan had not met the exhaustion requirement found in 28 U.S.C. s 2254. Failure to raise a federal claim in state court bars federal review of the omitted claim. Duncan v. Henry, 513 U.S. 364, ----, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982).

Finding no error, we affirm the judgment denying Buchanan's petition for a writ of habeas corpus.

AFFIRMED.

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384 S.E.2d 757
(Cite as: 238 Va. 389, 384 S.E.2d 757)

Douglas McArthur BUCHANAN, Jr.
v.
COMMONWEALTH of Virginia.
Record Nos. 890107, 890108.
Supreme Court of Virginia.
Sept. 22, 1989.

Defendant was convicted in the Circuit Court, Amherst County, Robert C. Goad, J., of capital murder for killing his father in the same transaction in which he killed his stepmother and two half brothers, and of first-degree murders of his father, brothers, and stepmother. Defendant appealed. The Supreme Court, Thomas, J., held that: (1) capital murder indictments gave defendant sufficient notice of charges; (2) second indictment was redundant; (3) trial court properly directed that in opening statements counsel were to say no more than that defendant had been charged with capital murder; (4) trial court properly denied request to read statement, designed to cushion effect of questioning prospective jurors about death penalty; (5) refusal to permit individual voir dire outside presence of spectators and press was proper; (6) defendant had full and fair opportunity to ascertain whether prospective jurors stood indifferent to the case; (7) trial court showed no partiality in selection of jurors; (8) defendant had no right to additional peremptory strikes; (9) change of venue was properly denied; (10) request for sequestration of jury was properly denied; (11) defendant was not entitled to second-degree murder instructions; (12) death penalty statute was constitutional; (13) capital murder statute was constitutional; (14) statute requiring vileness for death penalty imposition was constitutional; (15) defendant was not sentenced to multiple punishments for same offense; and (16) first-degree murder conviction for killing of father violated double jeopardy.

Affirmed in part, vacated in part.

[1] CRIMINAL LAW k29(14)
110k29(14)
Commonwealth was free to indict defendant for as many separate counts of capital murder as Commonwealth thought it could prove and was thus free to charge the commission of capital murder in several different ways with multiple alternative indictments. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

[2] INDICTMENT AND INFORMATION k132(2)
210k132(2)
Second capital murder indictment, which put defendant on notice that he could be convicted if jury believed he had killed his father and his brother as part of the single transaction or believed he had killed his father and stepmother as part of the same transaction, was redundant becausct that in opening statements counsel were to say no more than that defendant had been charged with capital murder for the killing of more than one person as part of the same act or transaction, where possibility existed that jury might not be instructed on each of eleven indictments. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

APPENDIX
A

[5] JURY k131(13)
230k131(13)
Trial court had discretion to refuse to read to prospective jurors a statement designed to cushion the effect of questioning prospective jurors about death penalty. Code 1950, s 8.01-358; Sup.Ct.Rules, Rule 3A:14.

[6] CRIMINAL LAW k635
110k635
Defendant had no right to individual voir dire outside the presence of spectators and press.

[6] JURY k131(13)
230k131(13)
Defendant had no right to individual voir dire outside the presence of spectators and press.

[7] JURY k131(17)
230k131(17)
Voir dire questions related to prospective juror's impressions of case and appropriateness of death penalty were properlydditional peremptory strikes. Code 1950, s 19.2-262.

[10] CRIMINAL LAW k137
110k137
Trial court properly attempted to seat jury before ruling on motion to change venue.

[11] CRIMINAL LAW k126(1)
110k126(1)
Trial court properly denied motion for change in venue, where jury selection was relatively easy, publicity was accurate and noninflammatory, and there was no indication of widespread prejudice against defendant in community.

[12] CRIMINAL LAW k854(4)
110k854(4)
Trial court properly denied request that jury be sequestered, where court had admonished jury not to read newspapers, watch television, or discuss case with anyone and there was no indication that jurors did not follow trial court's instructions.

[13] HOMICIDE k308(5)
203k308(5)
Defendant, charged with capital murder, was not entitled to second-degree murder instruction with regard to each of four murders, where evidence showed conclusively that murders were deliberate, premeditated, and willful. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

[14] CRIMINAL LAW k1206.1(2)
110k1206.1(2)
Death penalty statute is constitutional. U.S.C.A. Const.Amend. 8.

[15] HOMICIDE k351

203k351
Statute under which defendant was convicted of capital murder was constitutional. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7); U.S.C.A. Const.Amend. 8.

[16] CRIMINAL LAW k1206.1(2)
110k1206.1(2)
Statutory provision requiring vileness for imposition of death penalty is constitutional. U.S.C.A. Const.Amend. 8.

[17] CRIMINAL LAW k1030(1)
110k1030(1)
Appellate court will not consider issue not objected to in trial court. Sup.Ct.Rules, Rule 5:25.

[18] CRIMINAL LAW k29(14)
110k29(14)
When jury found that defendant killed all four victims as part of the same act or transaction, he could be found guilty of only one capital murder. Code 1950, s 18.2-31(g) (now s 18.2-31, subd. 7).

[19] CRIMINAL LAW k29(14)
110k29(14)
When defendant was convicted for capital murder of his father, as well as the first-degree murder of his father, his two half brothers, and his stepmother, he was left with five murder convictions when he killed four people and remedy was to vacate first-degree murder conviction for killing his father. Code 1950, ss 18.2-32, 18.2-31(g) (now s 18.2-31, subd. 7).

[20] CRIMINAL LAW k486(1)
110k486(1)
Experts in criminal cases must testify on the basis of their own personal observations or on the basis of evidence adduced at trial.

[21] CRIMINAL LAW k796
110k796
Rule that mitigating factors mentioned in statute must not be listed benefits defendant because jury could be misled into concluding that listed factors are the only factors they could consider in mitigation.

[22] COSTS k302.4
102k302.4
Trial court properly refused to allow defendant to secure additional neurological testing, in effort to develop evidence in mitigation, where defendant had been previously examined and physicians then were looking for, but did not find, the), for appellant.

Virginia B. Theisen, Asst. Atty. Gen., (Mary Sue Terry, Atty. Gen., Birdie H. Jamison, Asst. Atty. Gen., on brief), for appellee.

***389** Present: All the Justices.

***393** THOMAS, Justice.

Douglas McArthur Buchanan, Jr. (Buchanan), was tried by a jury and convicted of capital murder in violation of Code s 18.2-31(g) (now Code s 18.2-31(7)), for killing his father, Douglas McArthur Buchanan, Sr. (Buchanan, Sr.), in the same transaction in which he killed his half-brother, Joel Jerry Buchanan (J.J.); his half-brother, Christopher Donald Buchanan (Donnie); and his step-mother, Geraldine Patterson Buchanan (Mrs. Buchanan). In the second phase of the bifurcated capital murder trial, the jury fixed Buchanan's sentence at death.

In the same trial, the jury also convicted Buchanan of the first degree murders of his father, hhe commission of a felony with regard to each murder, ***394** sentencing him to a total of fourteen years in prison for those convictions. Code s 18.2-53.1.

The trial court entered judgment on the capital murder conviction and sentenced Buchanan to death. It also entered judgment on the four first degree murder convictions and sentenced Buchanan to four terms of life imprisonment. In addition, the trial court entered judgment on the firearm convictions and sentenced Buchanan to fourteen years imprisonment.

Buchanan appealed the capital murder conviction to this Court. Record No. 890107. We have consolidated that appeal with the automatic penalty review required by Code s 17-110.1. Buchanan appealed the non-capital convictions to the Court of Appeals. Pursuant to Code s 17-116.06, by order dated January 30, 1989, we certified that appeal to this Court. Record No. 890108. We have consolidated all matters and have given the consolidated case priority on our docket. Code s 17-110.2.

Buchanan's principal complaints concern whether the indictments gave him fair notice of the charges against which he had to defend, whether the trial court unduly restricted voir dire questioning, whether he was entitled to second degree murder instructions, whether the jury's verdicts were sufficiently supported by the indictments, and whether his right to be free of double jeopardy was violated by the sentences he received. In our view, with certain modifications more fully explained herein, the trial court's judgment should be affirmed.

I. FACTS

The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that day, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.

Buchanan found his father outdoors behind the house. He explained his having the rifle by telling his father that he had been squirrel hunting. The two went inside ****761** where they engaged in conversation. ***395** They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother. Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.

Fifteen minutes later, Buchanan heare he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra column, severing thce of the charges against which he had to defend. He argues that the various indictments permitted the jury to convict him of more than one capital murder based on the death of the same person, Buchanan, Sr. According to Buchanan, his main defense to the capital murder charges was to show that the killings were not part of the same transaction. Buchanan submits that the multiple alternative indictments created a situation in which he was never aware of which killings the Commonwealth alleged were part of the same transaction. During oral argument, Buchanan stated that the issue is not whether he knew he was on trial for capital murder; this was conceded. Rather, Buchanan submitted, the real question is how many charges of capital murder can be based on four murders and what is the proper way to frame the indictments. Defendant contends he was prejudiced because he was unable to focus his defense on a specific pair of killings as being unconnected; instead, he was forced to argue that none of the killings were part of the same transaction.

The three capital murder indictments against Buchanan were based on then Code s 18.2-31(g), which provided, in pertinent part, as follows: "The following offenses shall constitute capital murder ... (g) The willful, deliberate and premeditated killing **762 of more than one person as a part of the same act or transaction...." The first indictment charged, in essence, that Buchanan killed Buchanan, Sr. as part of the same act or transaction in which he killed J.J., Donnie, or, Mrs. Buchanan. The second indictment was in two counts; it charged, in essence, in Count I, that Buchanan killed Buchanan, Sr. and Donnie as part of the same act or transaction and in Count II, that Buchanan killed Buchanan, Sr. and Mrs. Buchanan as part of the same act or transaction. The third indictment was also in two counts; it charged, in essence, in Count I, that Buchanan killed Donnie and J.J. as part of the same act or transaction and in Count II, that *397 Buchanan killed J.J. and Mrs. Buchanan as part of the same act or transaction.

Buchanan's basic complaint is that because he killed four people in a relatively narrow time frame, he could only be indicted under Code s 18.2- 31(g) for one capital murder. He contends the Commonwealth was required to make an election among the indictments. Buchanan misreads the statute and misunderstands the law concerning indictments.

The statute described capital murder as the "willful, deliberate, premeditated killing of more than one person as a part of the same act or transaction." This means that it took the killing of at least two people as part of the same act or transaction to constitute one capital murder under Code s 18.1- 31(g). Here, four people were killed; thus, there was the theoretical possibility that Buchanan could be convicted of two capital murders. The critical issue is how many acts or transa that can be supported by four murders does not control the way in which the Commonwealth can frame indictments. The Commonwealth is free to indict an individual for as many separate crimes as the Commonwealth, in good faith, thinks it can prove. Further, the Commonwealth is free to charge the commission of a single offense in several different ways in order to meet the contingencies of proof. See Bryant v. Commonwealth, 189 Va. 310, 315, 53 S.E.2d 54, 56 (1949); R. Bacigal, Virginia Criminal Procedure s 13-6 (1983). The indictments of which Buchanan complains were proper. The Commonwealth was not required to make an election.

[2] The three indictments put Buchanan on fair notice of what he was required to defend against at trial. Under the first indictment, Buchanan was on notice that he had to defend against a claim that he killed Buchanan, Sr. and all three of the other victims as part of the same act or transaction; that he killed Buchanan, Sr. and any two of the other victims as ped Buchanan, Sr. and Mrs. Buchanan as part of the same act or transaction. This indictment was unnecessary because the first indictment provided for all possible groupings of victims in which Buchanan, Sr. was included. However, Buchanan has not described, and we do not perceive, any way in which he was prejudiced by the redundant nature of the second indictment.

[3] The third indictment was not redundant. Whereas the first and second indictments required that Buchanan, Sr. be part **763 of any grouping of two or more victims, the third indictment provided for the possibility that the jury might not believe that Buchanan, Sr. should be included as part of any grouping which was killed as part of the same act or transaction. Under the third indictment, Buchanan was on notice that he had to defend against the possibility that J.J. and Donnie were killed as part of the same act or transaction or that J.J. and Mrs. Buchanan were killed as part of the same act or transaction.

Thus, contrary to Buchanan's argument, he was never at risk of being convicted of more than one capital murder for killing the same person. The first and second indictments were in reality one indictment for capital murder in which Buchanan, Sr.'s death was a necessary part of a conviction. The third indictment permitted a conviction of capital murder in either of two situations where Buchanan, Sr.'s death did not come into play. Thus, at most, Buchanan faced conviction of two capital murders. But if he had been so convicted, there could not have been any overlap in the two pairs of murder victims on which the convictions were based. This was not a case of a defendant who had no idea what to expect when he came to court. When faced with defendant's attorney's argument that defendant had insufficient notice of the charges against him, the trial court remarked, "there's no way you don't know what he's charged with." We agree. See Boggs v. Commonwealth, 229 Va. 501, 519, 331 S.E.2d 407, 420 (1985).

*399 B. Ruling Forbidding Reference in Opening Statement to the Specific Indictments

[4] Buchanan argues that he was prejudiced in defending himself because the trial court would not allow him to describe to the jury the specifics of the several indictments against him. Because Buchanan faced eleven indictments, [FN1] and because the trial court recognized the possibility that it might not instruct the jury on each indictment, the trial court directed that in opening statements counsel were to say no more than that Buchanan had been charged with capital murder for the killing of more than one person as part of the same act or transaction. Buchanan submits that because he could not discuss the details of the several indictments, he could not discuss what his evidence would be during trial. He submits further that because the indictments were improper and because he could not mention them, he was denied the opportunity to prepare an awould risk greater prejudice by mentioning them specifically than by not mentioning them other than in general terms. Further, although the argument on brief is that Buchanan was prejudiced because he was precluded from mentioning all the indictments, in oral

argument Buchanan claimed prejudice because he faced redundant charges which were stacked up and which, because of their sheer number, left the jury with the impression that he was "bad."

We are of opinion that the trial court was fully within its authority when it instructed counsel not to make reference, in their opening statements, to the specific indictments. Such matters are within the discretion of the court. O'Dell v. Commonwealth, 234 Va. 672, 703, 364 S.E.2d 491, 509, cert. denied, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). We hold there was no abuse of discretion.

***400** III. JURY SELECTION

A. Proposed Statement To Prospective Jurors

[5] Prior to ths 8.01-358; Rule 3A:14. There is no provision in Virginia law which requires a trial court to read to prospective jurors a statement offered by a defendant. We hold that the statement was properly rejected.

B. Request For Closed Individual Voir Dire

[6] Buchanan argues that the trial court erred by refusing to permit individual voir dire outside the presence of spectators and the press. His basis for this novel proposition includes his contention that due process standards are higher in death penalty cases (citing Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)), and his reliance on a study of jurors conducted by the National Jury Project, Inc. Buchanan argues further that even if the trial court properly refused closed individual voir dire, it should have, at least, required individual voir dire.

A criminal defendant has no right to individual voir dire; the trial courts have broad discretion to decide how to conduct voir dire. Fisher v. Commonwealth, 236 Va. 403, 410, 374 S.E.2d 46, 50 (1988). It follows that there is no right to the more extreme measure of closed individual voir dire. Moreover, a decision to close a portion of a trial to the public would be fraught with problems of a constitutional nature. See Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). We hold that the trial court did not err in refusing closed individual voir dire.

Buchanan's complaint that the trial court did not conduct individual voir dire defies the record. On the first day of trial, Buchanan's motion for individual voir dire was granted. All questioning on that day was done individually. On the second day of trial, the trial court asked the prospective jurors general questions ***401** in groups of fifteen. Thereafter, each counsel asked his voir dire questions of individual prospective jurors. Buchanan participated in this procedure and did not object to it. He will not now be heard to complain. Rule 5:25.

C. Restrictions On Questions Asked by Defense Counsel

[7] During voir dire, the trial court would not allow Buchanan to ask the following two questions: (1) From what you have read or heard about this case in the newspapers, what impression do you have about this case? (2) Do you believe that a death sentence is the only appropriate punishment for capital murder? Buchanan argues that because he could not ask these two questions, he was prejudiced in his efforts to discover any bias among the prospective jurors. We disagree.

Trial courts must afford a party a "full and fair" opportunity to ascertain whether prospective jurors "stand indifferent in the cause." LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984). However, it is within the trial court's sound discretion to decide when a defendant has had such an opportunity. Id., 304 S.E.2d at 653. Further, trial courts are not required to allow counsel to ask questions which are so ambiguous as to render the answers meaningless. See id. 225 Va. at 579, 304 S.E.2d at 652-53. To be permissible, counsel's questions must be relevant in that they are such as wouldmple opportunity to counsel to ask relevant questions and where the questions actually propounded by the trial court were sufficient to preserve a defendant's right to trial by a fair and impartial jury, we will generally not reverse a trial court's decision to limit or disallow certain questions from defense counsel. See LeVasseur, 225 Va. at 582, 304 S.E.2d at 653; Mackall v. Commonwealth, 236 Va. 240, 251, 372 ****765** S.E.2d 759, 766 (1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

***402** To ask a prospective juror his impression of a case may, through a circuitous route, lead finally to a disclosure of opinion or prejudice. But, as noted above, to be relevant, a question to a prospective juror must necessarily disclose or clearly lead to the disclosure of opinion or prejudice. We do not think the first question is of that kind. It is ambiguous and unfocused. It does not, for example, ask whether, based on news coverage, the prospective juroson v. Commonwealth, 222 Va. 653, 659 n.*, 283 S.E.2d 212, 216 n.* (1981), we upheld the trial court's rejection of the following question: "Do you believe that the death penalty is ordinarily the proper punishment for the crime of capital murder?" The specific question Buchanan sought to ask was, "Do you believe that a death sentence is the only appropriate punishment for capital murder?" The question proposed in Wm. Patterson and the one proposed here are virtually the same. Buchanan's question was properly rejected. [FN2]

FN2. We note further that the issues of jury bias and of attitudes towards the death penalty were fully and fairly explored by the trial court and counsel during voir dire. Jury selection took two days and covered more than 577 pages in the appendix. Buchanan complains that the trial court's questioning was of little use in selecting a jury because the trial court's questions were "close-ended" and "leading," while the questions Buchanan proposed were "open-ended"such conduct by a trial court constitutes reversible error. Even if Buchanan is correct about the legal proposition which he asserts, a question which we do not decide, his charges are baseless as a matter of fact.

Buchanan's first specific complaint is that the trial court criticized his counsel during the voir dire of prospective juror Baker. But this complaint is not properly before the Court. After questioning Baker, Buchanan's counsel stated, "We'll leave him, Judge. Mr. Buchanan has agreed to that." Rule 5:25.

Buchanan complains that when prospective juror Rucker stated to the court that he could not enter the jury box with an open mind and without regard to knowledge he had acquired, the trial court excused him. According to Buchanan, the trial court did not give him the opportunity to question Rucker. Quite apart from the obvious proposition that Buchanan could not be prejudiced by the trial court's striking a prospective juror who was biased against him, Bucms were struck for cause without his having a chance to question them. Just as Buchanan made no attempt to question Weigland and Thomas, the same is true for the three other jurors: Warrick, Renalds, and Taylor. Rule 5:25.

***404** Buchanan also challenges the trial court's seating of prospective jurors Garrett and Barton. However, Buchanan expressly accepted both jurors. Rule 5:25.

Buchanan argues that the trial court improperly questioned prospective jurors Hedrick, Merryman, Hartberger, and Jedelsky. However, each of these prospective jurors was struck for cause. Further, because the voir dire of each potential juror was individual, no prospective juror

heard the questioning of any other. Buchanan was not, and could not have been, prejudiced by the trial court's actions.

Buchanan next argues that the trial court showed partiality in its treatment of prospective juror Giles. Buchanan submits that because Giles indicated reservations about the death penalty, the trial court gave the Commonwealth's Attorney a chance to cross-examine her "in an effort to have the juror stricken for cause." However, the trial court seated this juror despite the Commonwealth's Attorney's motion to strike her for cause. There was nothing improper about the trial court's treatment of juror Giles.

Buchanan argues that he was prejudiced by the trial court's actions and comments during the voir dire of prospective juror Fitzgerald. He contends that the trial court interrupted his questioning and described one question as "sneaky." The trial court's statement was made after Fitzgerald had left the courtroom and no other prospective jurors were present. There was no prejudice to Buchanan from this comment.

Buchanan further complains that the trial court would not permit him to ask Fitzgerald: "Do you believe that the death sentence is the only appropriate sentence for capital murder?" We have ruled previously in this opinion that the trial court properly excluded that question. Further, the manner in which the court interrupted the questioning was not abrupt, abrasive, discourteous, rude, or indicative of bias. The trial court simply said: "Well, see that's not a proper question because he's not presumed to know what the law is...."

The trial court also would not allow Buchanan to ask Fitzgerald "Do you believe that there are any circumstances in a capital case that would warrant life imprisonment rather than the death penalty?" The trial court excluded the question on the grounds that it was hypothetical and that the trial court already had asked the same question more than three times. Again, we find nothing abrupt, abrasive, discourteous, rude, or indicative of bias in the manner ***405** of the questioning. [FN4] We find no bias in the trial court's handling of Fitzgerald's questioning.

FN4. The question itself, thoupartial jury. He states further that "[t]his summary of the voir dire procedure demonstrates that the court abused its discretion in the conduct of voir dire." We think it proves just the opposite. ****767** The trial court conducted proper voir dire, which has been subject to unfounded attack by Buchanan in this appeal. We hold that the trial court did not display bias or partiality towards the Commonwealth.

E. Motion For Additional Peremptory Strikes

[9] Buchanan moved for additional peremptory strikes. The trial court rejected his motion. Buchanan argues, in essence, that because this is a capital murder case, he was entitled to additional strikes. He contends that if he had had such further strikes he would have used them to strike prospective juror Baker.

The request was properly denied. There is no basis in Virginia law for additional peremptory strikes. Code s 19.2-262. See O'Dell, 234 Va. at 690, 364 S.E.2d at 501 (1988).

, under these circumstances, the failure to change venue denied him an impartial jury.

Buchanan argues further that the trial court utilized an erroneous legal test in deciding the motion to change venue. According to Buchanan, the trial court ruled that the only way to overcome the presumption that a defendant can receive a fair trial in his venue is to be unsuccessful in an attempt to seat a jury. Buchanan submits that the correct test is whether, under the totality of the circumstances, a defendant will receive an impartial jury.

We turn first to the question whether the trial court was correct in attempting to seat a jury before he ruled on the motion to change venue. Although Buchanan now complains of the trial court's approach, at trial he agreed to it; his counsel stated as follows: I think [the Commonwealth's Attorney] is right in his assessment that under Virginia law we have to try to seat a jury, but this motion has to be made at this time so that we have on record that we think it's going to be difficult to seat a jury in this case. In addition, the trial court's approach to resolving the venue question was fully in accord with established Virginia law.

Venue decisions are entrusted to the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion. Mackall, 236 Va. at 250, 372 S.E.2d at 765; Gray v. Commonwealth, 233 Va. 313, 333, 356 S.E.2d 157, 168, cert. denied, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); Boggs, 229 Va. at 513, 331 S.E.2d at 417. Further, a criminal defendant who challenges venue confronts a presumption that he can receive a fair trial from a jury of the vicinage. Mackall, 236 Va. at 250, 372 S.E.2d at 766; Boggs, 229 Va. at 513, 331 S.E.2d at 417. To overcome this presumption, a defendant has the burden of "establishing clearly such a pervasive prejudice among the citizens of the venue of the crime as to make it reasonably certain that he will not receive a fair trial." Mackall, 236 Va. at 250, 372 S.E.2d at 766; Stockton v. Commonwealth, 227 Va. 124, 137, 314 S.E.2d 371, 379-80, cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). See Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589 (1975).

Jurors are not required to be totally ignorant of the facts and issues in a case. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). ***407** Consequently, the mere showing of extensive publicity or general knowledge of a crime or of the accused, including his criminal record, is not enough to justify a change of venue. See Mackall, 236 Va. at 250, 372 ****768** S.E.2d at 766; see also Boggs, 229 Va. at 513, 331 S.E.2d at 417; Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977).

In deciding whether a change in venue is warranted, it is pertinent whether the publicity concerning the case is factually accurate, temperate, and noninflammatory. See Washington v. Commonwealth, 228 Va. 535, 544, 323 S.E.2d 577, 583 (1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); see also Mackall, 236 Va. at 250, 372 S.E.2d at 766; Gray, 233 Va. at 333, 356 S.E.2d at 168. Also pertinent is the rel 99 L.Ed.2d 716 (1988); Washington, 228 Va. at 544-45, 323 S.E.2d at 583. This is so because the relative ease of seating an impartial jury negates the existence of the "widespread prejudice" which a criminal defendant must show to justify a change in venue. Pope, 234 Va. at 120, 360 S.E.2d at 356.

Here, in his motion to change venue, Buchanan complained of a large amount of publicity but not that the publicity was false. The trial court considered the various news articles submitted by Buchanan and ruled that "[t]hey were just factual articles telling what actually had happened."

Buchanan also complained that eight of the twelve jurors came from one particular part of the county. The trial court ruled that the master jury list had been randomly drawn, that the jury selection process involved questioning thirty-six prospective jurors to select a panel of twenty, and that there was nothing unusual about the selection process or the fact that those ultimately chosen to sed essentially on Stockton v. Commonwealth, 852 F.2d 740 (4th Cir.1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). However, in that case, which was on federal habeas review of this Court's decision in Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984), the Fourth Circuit noted specifically that its grant of habeas relief to Stockton was not based on any abuse of discretion in denying sequestration: "We do not hold that the trial court abused its discretion in refusing to ... sequester the jury." Stockton, 852 F.2d at 746.

The question whether to sequester the jury is entrusted to the sound discretion of the trial court and the trial court's decision in that regard will not be disturbed absent a showing of an abuse of discretion. See e.g., Pope, 234 Va. at 121, 360 S.E.2d at 357; Gray, 233 Va. at 340, 356 S.E.2d at 172; Jones v. Commonwealth, 228 Va. 427, 442-43, 323 S.E.2d 554, 562 (1984), cert. denied, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985). The trial court did not abuse its discretion. At the end of each day of trial, the court admonished the jury not to read the newspapers, watch television, or discuss the case with anyone. Buchanan now complains that when trial convened each morning, the trial court did not ask whether the jurors had abided by its instructions. Buchanan neither requested such questioning at trial nor objected to the lack of it. Rule 5:25. Unless it is shown otherwise, we will presume that jurors follow the trial court's instructions to avoid exposure. See Jones, 228 Va. at 443, 323 S.E.2d at 562; Waye v. Commonwealth, 219 Va. 683, 701, 251 S.E.2d 202, 213, cert. denied, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979).

**769 We hold that the trial court did not err in denying the motion to sequester the jury.

V. INSTRUCTIONS ON LESSER OFFENSES

[13] Buchanan contends he was entitled to a second degree murder instruction with regard to each of the murders. With regard to his father's murder, Buchanan contends there was evidence that he shot his father only after he became angry about disparaging remarks his father had made concerning Buchanan's deceased natural mother. In oral argument, Buchanan's counsel explained that his claim of the appropriateness of a second degree murder instruction was based on the fact that defendant said he got "mad." *409 Buchanan submits that, in light of his testimony, the jury could have believed that he "acted in the heat of passion and killed his father out of anger rather than as a result of premeditation."

With regard to the murder of his brothers and his step-mother, Buchanan does not rely upon any facts as the basis for his claim of a right to second degree murder instructions. Instead, he relies on Painter v. Commonwealth, 210 Va. 360, 171 S.E.2d 166 (1969), for the general proposition that all homicide is presumed to be second degree murder. He then argues that this case is similas, therefore, that a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." Clark v. Commonwealth, 220 Va. 201, 209, 257 S.E.2d 784, 789 (1979), cert. denied, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

A second degree murder instruction is only appropriate where it is supported by evidence. Justus v. Commonwealth, 222 Va. 667, 678, 283 S.E.2d 905, 911 (1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982); Painter, 210 Va. at 367, 171 S.E.2d at 171. Moreover, the evidence asserted in support of such an instruction "must amount to more than a scintilla." Justus, 222 Va. at 678, 283 S.E.2d at 911; Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978).

The foregoing legal principles leave no doubt that Buchanan was not entitled to second degree murder instructions with regard to the murders of Mrs. Buchanan, J.J., and Donnie. Buchanan's claim for such instructions with re Each time he admitted that his wife knew what he was going to do before he did it. In his first confession and at trial, he admitted that he and his wife drove to the Buchanan house on September 14, the night before the murders, in order to kill his family, but that he could not commit the murders at that time. In each version of the events of September 15, Buchanan admitted walking to his father's house carrying a loaded .22-caliber rifle. In his second confession, he admitted that he wore rubber gloves when he committed the murders.

Buchanan's descriptions of what transpired just prior to his father's murder were as follows: In his first confession, he **770 stated that he and his father were inside the house talking but his father did not ask how Buchanan and his wife were doing. Buchanan said this omission "was really making [him] mad." He stated that he and his father started arguing but he immediately explained without any prodding from the examiners that: "I mean it wasn't--I mean it wasn't a heated argument." Buchanan continued: "All right--then he started to walk out the door and I shot him." Buchanan's interviewer asked him to explain exactly what happened. Buchanan replied, "[h]e turned around instead of walking out the door and I shot him from behind." Asked what happened next, Buchanan answered: "And then he fell to the ground and I shot him again."

Buchanan was then asked specifically whether he and his father were arguing at the time Buchanan, Sr. was killed; Buchanan said no: "See we weren't arguing at the time. What he was doing was gonna show me his blue Nova [automobile], cause I hadn't seen it before." The interviewer asked what lead up to the murders; Buchanan replied: "They never treated me like a son--they treated me like an outsider all the time. I mean--I don't think they cared." Again Buchanan was asked whether it was any particular thing that "set it off at this particular time." He replied: "there was no one thing that they could of done that--would have done that, it's just that I mean, they never talked to me when I was living there."

In his second confession, Buchanan stated that he and his father were inside the house talking "and started arguing--not really arguing but just, you know, just disagreeing, mostly. And just *411 hassling--it's been going on between us and things like that. Then uh he wanted to talk and showed me the-- the newest Nova that he had." Buchanan stated further that: "And uh and then I shot him then--before he went out the door." When asked where he shot his father, Buchanan replied: "From the back--in the back of the head." Then Buchanan shot his father again, this time in the face.

At trial, on direct examination, Buchanan said that he and his father were inside the house talking when his father said that Mrs. Buchanan was cheating on him. Buchanan suggested that his fatheBuchanan tried to defend his natural mother, his father broke off the conversation saying "that's it, let's go out and look at this car I bought for J.J." These questions and answers followed: Q. And then what happened? A. Then he started to walk out the door and I shot him. Q. Why did you do it? A. I don't know. I was just mad. I just was--I don't know really why I did it. I didn't mean to. It just happened. Q. Well, what happened after you shot him? A. I just kind of stared at him for a minute--I don't know--I didn't know--I was scared--I didn't know what to do. And then I shot him again.

On cross-examination, Buchanan testified that the argument with his father had not been heated: "It wasn't really heated. It's just that he yelled at me a couple of times." "It was no stand up arguing or pushing or anything like that." "[W]e were both getting mad, but we were not pushing or fighting." Buchanan also admitted that his father tried to call off the disagreement by suggesting **4to walk out the door when Buchanan--having time to think and, by his own admission, intending to kill--shot him in the back of the head. "A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill." Giarratano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980). See Barnes v. Commonwealth, 234 Va. 130, 136, 360 S.E.2d 196, 201 (1987); Bradshaw v. Commonwealth, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939). Once his father fell, Buchanan shot him between the eyes. In our view, Buchanan relies on but a scintilla of evidence to support his motion for a second degree murder instruction;

this is not enough. The evidence to which he points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that Buchanan acted without premeditation. We hold that the trial court did not err in denying Buchanan's request for a second degree murder instruction concerning his father's murder.

VI. CONSTITUTIONAL CHALLENGE TO THE STATUTORY SCHEME

A

[14] Buchanan contends that the Virginia death penalty statute is unconstitutional because it commits the sentencing decision to the unbridled discretion of a judge or a jury. This challenge to the Virginia statute is not new and has previously been considered and rejected. See, e.g., Hoke v. Commonwealth, 237 Va. 303, 305, 377 S.E.2d 595, 597, cert. denied, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989); Pope, 234 Va. at 121-22, 360 S.E.2d at 357; Gray, 233 *413 Va. at 320, 356 S.E.2d at 160; Stockton, 227 Va. at 134-35, 314 S.E.2d at 378. We adhere to our previous rulings.

B

[15] Buchanan also contends that Code s 18.2-31(g), the provision under which he was convicted of capital murder, was unconstitutional. The statutory provision read as follows: "The following offenses shall constitute capital murder ... (g) The willful, deliberate and premeditated killing of more than one person as part of the same act or transaction...." Buchanan contends that the term "transaction" is inherently ambiguous. He submits that the term "encompasses such a broad spectrum of behavior that it does not sufficiently limit the circumstances, for which one can receive the death penalty."

We considered and rejected this precise argument in Woodfin v. Commonwealth, 236 Va. 89, 372 S.E.2d 377 (1988). There, we explained that a "penal statute is void for vagueness if it fails to give a person of ordinary intelligence notice that his contemplated conduct is forbidden by the statute and if the enactment encourages selective law enforcement." Id. at 92, 372 S.E.2d at 379. In Woodfin, we said there was nothing uncertain or ambiguous about the phrase "same act or transaction" when it was applied to the criminal defendant's actions in that case. We held that two offenses arise out of the "same act or transaction" if they are so closely connectedt which is qualitatively different from conduct in a non-capital murder." We have already considered and rejected this argument. Turner v. Commonwealth, 234 Va. ***414** 543, 552, 364 S.E.2d 483, 488, cert. denied, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). We adhere to our previous rulings. [FN5]

FN5. Included within this constitutional attack on the vileness test is an argument, advanced for the first time on this appeal, that the trial court should have ruled, as a matter of law, that the killings of Buchanan, Sr. and Donnie were not vile. Rule 5:25.

VII. CHALLENGES TO THE GUILT PHASE VERDICT

A. Discrepancy Between The Indictment and the Jury's Verdict

[17] Buchanan complains that there is a discrepancy between the indictments and the jury's verdicts because the jury found him guilty of the capital murder of each of the victims instead of finding him guilty of only one capital murder. Buchanan did not object to the jury's verdict on this basis. [FN6] Thus, we will not consider this issue. Rule 5:25.

FN6sed on the evidence in this case and the law, that the jury should not have found that all four killings were part of the same transaction."

B. Double Jeopardy Violation

[18] Buchanan contends that the jury's verdict violated his Fifth Amendment right to be free of multiple punishments for the same offense. He argues that since he killed four people and was tried and convicted of four first degree murders, his additional conviction of capital murder subjected him to multiple punishments for the same offense because first degree murder is a lesser included offense of capital murder. And, he argues, a conviction of a lesser included offense constitutes acquittal of all higher offenses. In oral argument, Buchanan approached the issue from the other direction; he submitted that because the jury returned a verdict of four capital murder convictions, the jury could not convict him of four first degree murders. On brief, Buchanan argues that because the capital murder convictions and the first degree murder convictions were based on the same facts, the first degree murder convictions should stand and the capital murder convictions should be dismissed.

The Commonwealth argues that two basic principles refute Buchanan's concern about a Fifth Amendment multiple punishment ***415** violation. The first principle is that where a defendant is convicted of more than is charged in the indictment, the excess convictions must be set aside and the related sentences vacated. See Morris v. Commonwealth, 228 Va. 206, 209, 321 S.E.2d 633, 634- 35 (1984). The second principle is that where, in a single trial, a defendant is convicted of a lesser included offense and the greater offense, the proper remedy is to vacate both the conviction and sentence of the lesser included offense while leaving in place the conviction and sentence on the greater offense. Brown v. Commonwealth, 222 Va. 111, 116, 279 S.E.2d 142, 145 (1981). See United States v. Buckley, 586 F.2d 498, 505 (5th Cir.1978), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 242 (1979). We agree with the Commonwealth.

The only indictment on which the jury was instructed was the first indictment wherein Buchanan was charged with killing Buchanan, Sr. as part of the same act or transaction in which he killed J.J., Donnie, or Mrs. Buchanan. Under this indictment, the jury could convict Buchanan of only one capital murder, but the indictment gave the jury seven choices as to which victims were killed as part of the same act or transaction. The jury found that Buchanan killed all four victims as part of the same act or transaction. However, the jury then went on to find Buchanan guilty ****773** of the capital murders of each of the four victims. This second part of the verdict was, under the indictment on which the jury was instructed, beyond the jury's power. Given the way the indictment was framed, the only capital murder which the jury could find was that of Buchanan, Sr. Unde, as the Commonwealth concedes, incorrect. The problem, as the Commonwealth describes it, is one too many first degree murder convictions.

The remedy is uncomplicated. Under the rule in Brown, Buchanan's first degree murder conviction for killing his father must be vacated along with the related sentence. [FN7]

FN7. The trial court's view that Fitzgerald v. Commonwealth, 223 Va. 615, 637, 292 S.E.2d 798, 810-11 (1982), supports the five convictions is incorrect. In Fitzgerald, a capital murder-robbery case, we held that the defendant could be convicted of capital murder for the killing and also be convicted separately of the robbery. In order for Fitzgerald to support the five convictions which occurred in the instant appeal, we would have had to rule that Fitzgerald could have been convicted of capital murder, first degree murder, and robbery.

*416 VIII. MISCELLANEOUS

A

Buchanan claims the trial cour out-of- court interviews and discussions they had had in arriving at their expert opinion concerning Buchanan's state of mind at the time of the murders and the need for further neurological testing. Buchanan urges us to apply the expert testimony rule that applies in civil cases, Code s 8.01-401.1.

The trial court excluded testimony of the hearsay information on the ground that experts in criminal cases must testify on the basis of their own personal observations or on the basis of evidence adduced at trial. The trial court was plainly correct. We decided the issue in Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984). We adhere to our previous ruling.

C

[21] Buchanan submits that it was error to list the statutory aggravating factors for the jury while refusing to list the mitigating factors mentioned in the statute. Even in advancing this argument, Buchanan admits that it is contrary to Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986). Yet he asks us to reconsider Watkins. We decline the invitation. The rule that the mitigating factors mentioned in the statute must not be listed is intended to benefit the *417 defendant. If the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation. But the intent of the statute is to leave the jury free to consider, in mitigation, whatever the jury deems appropriate. Watkins, 229 Va. at 491, 331 S.E.2d at 438; Clark, 220 Va. at 212, 257 S.E.2d at 790.

D

Buchanan argues that the trial court erred by refusing to advise the jury regarding **774 consecutive sentences and the possibility of parole. There was no error in this ruling. We have held that a jury must impose the sentence it deems appropriate without regard to what will happen later. See Poyner v. Commonwealth, 229 Va. 401, 418-19, 329 S.E.2d 815, 828, cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 and 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 178 (1985).

E

Buchanan argues here for the first time that penalty phase instruction 1-P should not have been granted. Yet, at trial, defense counsel said there was "no objection" to the instruction. Rule 5:25.

F

[22] Buchanan submits that the trial court erred in refusing to allow him to secure additional neurological testing in an effort to develop evidence in mitigation. Buchanan sought to establish that his brain had suffered temporal lobe damage.

Prior to trial, Buchanan was examined at the University of Virginia. Those examinations included a complete neurological examination, an E.E.G., and an M.R.I. (magnetic resonance imaging). All tests were negative. When he was examined at the University of Virginia, the doctors there were looking for, but did not find, the same type brain damage that Buchanan hoped to find with a new series of tests. At a hearing on the motion, the evidence showed that even if temporal lobe damage is found, the authorities anwealth, 232 Va. 521, 528, 352 S.E.2d 342, 346, cert. denied, 483 *418 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). In our opinion, the trial court did not abuse its discretion in denying the motion.

IX. STATUTORY REVIEW

[23] Our independent review of the record reveals nothing to suggest that the death penalty was imposed in this case as the result of passion, prejudice, or arbitrariness. The evidence of guilt was fully sufficient. This same evidence was relied upon in the penalty phase and was ample to support the death penalty. We hold that this death sentence was not imposed arbitrarily or on the basis of passion or prejudice.

Defendant does not argue, and we find no evidence, that this death sentence was excessive or disproportionate. We have accumulated death penalty cases involving Code s 18.2-31(g), and other death penalty cases involving death by gunshot where the death penalty was based on vileness, and we conclude that jurio. 890107--Affirmed.

Record No. 890108--Modified and Affirmed.

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AT ROANOKE, VA
FILED
JAN 25 1996
MORGAN E. SCOTT, JR., Clerk
By: Deputy Clerk
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

DOUGLAS MCARTHUR BUCHANAN,	)	
	)	
Petitioner,	)	Civil Action No. 93-0306-R
	)	
v.	)	ORDER
	)	
EDWARD W. MURRAY, DIRECTOR,	)	
VIRGINIA DEP'T OF	)	
CORRECTIONS AND THE	)	
COMMONWEALTH OF VIRGINIA,	)	By: Hon. James C. Turk
	)	United States District Judge
Respondents.	)	

In accordance with the written memorandum opinion entered this day, it is hereby

ADJUDGED AND ORDERED

(1) that respondent's motion to dismiss the above referenced petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, shall be and hereby is **GRANTED**;

(2) that the petition for *habeas* relief shall be and hereby is **DENIED**;

(3) that petitioner's motion for discovery shall be and hereby is **DENIED**; and

(4) that this action is stricken from the active docket of this court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 25th day of January, 1996.

James C. Turk
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
E. L. Weeks
DEPUTY CLERK

APPENDIX
B

CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA
FILED
JAN 25 1996
MORGAN E. SCOTT, JR., Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DOUGLAS McARTHUR BUCHANAN,	)	
	)	
Petitioner,	)	Civil Action No. 93-0306-R
	)	
v.	)	MEMORANDUM OPINION
	)	
EDWARD W. MURRAY, DIRECTOR,	)	
VIRGINIA DEPT. OF	)	
CORRECTIONS, AND THE	)	
COMMONWEALTH OF VIRGINIA,	)	By: Hon. James C. Turk
	)	United States District Judge
Respondents.	)	

DOUGLAS McARTHUR BUCHANAN brings this action as a petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254. He states that he is confined by respondents under a sentence of death at the Mecklenburg Correctional Center, located in Boydton, Virginia. He claims that his confinement is in violation of the Constitution of the United States for the reasons set forth herein. Respondent has filed a motion to dismiss the §2254 petition as meritless, to which petitioner submitted a memorandum in opposition. Respondent then submitted a reply to petitioner's memorandum, to which petitioner again filed a memorandum in opposition. The court has also received the complete trial, appellate and post-conviction record of petitioner's case. After review of the record and the pleadings submitted by the parties, the court finds no material issues of fact to be in dispute and, thus, determines that no evidentiary hearing is necessary to evaluate the merits of petitioner's *habeas* claims. Furthermore, in accordance with the following, it is the opinion of the court that the motion to dismiss must be granted and that the petition for *habeas corpus* must be denied.

I. FACTS

Petitioner Douglas McArthur Buchanan, Jr., was convicted by a jury in the Circuit Court for Amherst County, Virginia, for killing his father, Douglas Buchanan, Sr.; his stepmother, Geraldine Buchanan; and his two stepbrothers, Donnie and J.J. Buchanan on September 15, 1987. Buchanan was nineteen years old at the time of the killings. Although he confessed to performing the killings, he asserts that his wife, Christianne, two years his senior, was the driving force behind the murders. She has also confessed to her participation in planning and preparing for the killings.

Family history seems to have played some part in the killings. Buchanan's natural mother died after a long illness when he was nine. Six months later, his father married Geraldine, a first cousin of Mrs. Buchanan. When he was a young child and then while his mother was sick, Buchanan often stayed with her parents and other relatives on her side of the family. About a year after his mother's death, however, some sort of family feud arose between his parents (his father and Geraldine) and his natural mother's relatives. Buchanan was punished if he waved or talked to them, even though they lived close by. Geraldine removed or burned all the pictures of his mother that she could find, saying she wanted to be his only mother. His parents also forbade him from visiting his mother's grave. He had other disagreements with his parents over chores and extracurricular activities. He ran away on several occasions and joined the National Guard before finishing high school.

On December 8, 1986, Buchanan married Christianne secretly. After his parents discovered the marriage, the couple lived in Buchanan's bedroom in his parents' home for several months. Later, his parents helped the young couple get their own housing. In June,

1987, Buchanan had an emergency appendectomy. While he was in the hospital, Christianne invited his mother's relatives to visit him, angering Buchanan's father and Geraldine. Buchanan testified that he and Christianne did not speak to his parents from June until September.

On September 14, 1987, Buchanan and Christianne talked about killing his parents.[1] The two of them even drove to the Buchanan home that evening, but Buchanan decided not to kill anyone that night and they left. The next day, September 15, Buchanan missed work. He and Christianne drove to the Blue Ridge Parkway and had a picnic at a spot within several minutes walk of the Buchanan home. Sometime around 3:00 in the afternoon, Buchanan walked from the picnic spot to his father's house. He carried a .22 caliber rifle and a pair of rubber gloves. He found his father in the yard and told him that he had been squirrel hunting. They went inside and talked for awhile without incident, but then the conversation turned to an old disagreement over the supposed infidelity of Buchanan's natural mother. The discussion angered them both, and there was considerable yelling. Even so, Buchanan told police that it was not a heated argument.

The father changed the subject and asked Buchanan to come outside to see a car he had recently purchased for J.J., Buchanan's thirteen-year-old stepbrother.[2] As his father walked toward the door, Buchanan shot him in the back of the head. The father fell. Buchanan then

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[1]According to Buchanan's testimony, Chris told him that the only way to solve his family problems was to kill the family. Buchanan asserts that Christianne was highly unstable and that she resented Geraldine, perceiving her as competition for his affection. She was dismissed from the Air Force on psychiatric grounds shortly after she and Buchanan married.

[2]Buchanan testified that this remark angered and hurt him because he had not been allowed to get a driver's license until he was eighteen, and he had never been given a car.

placed the nose of the rifle against his father's forehead and fired again. Buchanan dragged the body to the master bedroom and put a towel over the face. He got a .22 caliber pistol from under a mattress and took it with him back to the living room.[3]

About fifteen minutes later, Buchanan heard Donnie and J.J. arriving home from school. Holding the rifle, he hid behind the door. As Donnie, age ten, walked in the door past Buchanan, Buchanan shot him in the back of the head[4] and then in the face near his right temple. J.J. heard the shots and ran back out into the yard where Buchanan shot and wounded him in the back. Buchanan promised to call for help and coaxed J.J. to come back into the house where Buchanan shot him a second time, in the head. Buchanan pulled the boys' bodies out of the living room, but J.J. was still alive. He got up and walked back into the living room. Buchanan got a knife from the kitchen and stabbed the boy numerous times in the head, back and neck, severing his carotid artery.

Buchanan testified that he had blamed Geraldine, his stepmother, for all the family problems, since they started with her marriage to his father. He stated that on September 15, he went to the house intending to talk to her, expecting that she would be home alone.[5] After killing his father and the boys and moving their bodies, Buchanan testified, he grew very angry at Geraldine and determined to kill her also. He spread a blanket over the bloodstains in

[3]Buchanan testified at trial that he thought about killing himself at this point and that he was about to leave the house when his stepbrothers came home.

[4]Buchanan testified that he did not intend to shoot, that the rifle just went off. He said that he had never planned to kill the boys, but testified that "it just happened" and that he went "crazy" after killing his father.

[5]He testified that he took the gun to the house for protection, as Geraldine had once drawn a gun to break up a fight between Buchanan and his father. He remembered that Geraldine usually tried to be home by 3:00 in the afternoon on weekdays, before the boys got home from school, but she had recently started a new session of classes at Sweetbriar College and was working part time.

the living room and waited for her to come home. When he heard her arrive, he hid behind the door. As she stood in the living room, he fired at her, but the gun did not function. He fired again, and the bullet grazed her head. She fell to her knees. Buchanan stabbed her repeatedly with the kitchen knife in the neck, skull and chest. Her neck was severed to the spine, and she had knife wounds in her hands as though she had tried to defend herself.[6]

Taking the knife and the rifle, Buchanan fled from the house and walked through the woods back to the Parkway where Christianne was waiting in their truck. She drove and helped him dispose of his bloody tennis shoes, the knife and the rifle. Buchanan and Christianne fled to New Mexico where they were ultimately apprehended and confessed to the murders.

II. PROCEDURAL HISTORY

On October 6, 1987, Buchanan was indicted by a Grand Jury of Amherst County, Virginia, for four capital murders and four counts of use of a firearm in the commission of a murder.[7] Three of these initial capital murder indictments were later quashed. The Grand Jury then issued two additional capital murder indictments of two counts each and separate indictments bringing four counts of first degree murder. Buchanan objected to the additional capital murder indictments as vague and redundant.[8] In February, 1988, the Circuit Court for

[6]Buchanan denies that she struggled.

[7]As now numbered, Va. Code Ann. §18.2-31(7), the Virginia death penalty statute, provides that a person may be charged with capital murder for "[t]he willful, deliberate, and premeditated killing of more than one person as part of the same transaction."

[8]The specific posture of the indictments in Buchanan's case will be discussed in greater detail, infra, in conjunction with the court's analysis of his claims involving the indictments.

Amherst County denied Buchanan's motion for a change of venue. In April, the court denied petitioner's motions for additional peremptory challenges, his motion to sequester the jury, and his renewed motion for change of venue. On April 25, 1988, Buchanan pled not guilty to all charges.

The Amherst Circuit Court conducted a jury trial April 26-28, 1988. The jury convicted Buchanan of at least one charge of capital murder, four counts of first degree murder, and four counts of use of a firearm in the commission of a murder. After a separate sentencing hearing on April 29 and 30, 1988, the jury sentenced Buchanan to death on the capital murder conviction, to life imprisonment on each of the four first degree murder charges, to two years on one of the firearms charges, and to four years on each of the three remaining firearms charges. On August 19, 1988, after reviewing the state probation officer's post-sentence report and denying petitioner's requests for additional neurological testing, the court overruled petitioner's motion to set aside the verdict of the jury and imposed the jury's recommended sentences.

On September 22, 1989, the Supreme Court of Virginia set aside the first degree murder conviction for the killing of Buchanan's father, and affirmed the capital murder conviction, the remaining three first degree murder convictions, and the firearms convictions. Buchanan v. Commonwealth, 384 S.E.2d 757 (Va. 1989), cert. denied, 493 U.S. 1063 (1990) [hereinafter Buchanan]. By order dated January 22, 1990, the United States Supreme Court denied a petition for writ of certiorari. Buchanan v. Virginia, 493 U.S. 1063 (1990).

In June, 1990, Buchanan filed a petition for writ of *habeas corpus* in the Circuit Court of Amherst County, Virginia; he subsequently amended the petition in September, 1990. The

Circuit Court, by order dated August 15, 1991, dismissed all of petitioner's claims except one allegation of ineffective assistance of counsel. On September 24, 1990, the Circuit Court conducted an evidentiary hearing on this sole remaining allegation, but issued a final order dismissing all of Buchanan's *habeas* claims on December 19, 1991. Buchanan filed a petition for appeal of this dismissal to the Virginia Supreme Court. By unpublished order dated June 25, 1992, the Virginia Supreme Court denied the petition. Buchanan then filed a timely petition for writ of certiorari to the United States Supreme Court which was denied. Buchanan v. Murray, 113 S.Ct. 501 (1992).

III. PETITIONER'S CLAIMS

I. During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

II. The penalty phase instructions to the jury were constitutionally deficient because they failed to instruct the jury surficiently as to mitigation and as to the aggravating circumstance of "vileness."

   A. The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

   B. The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

   C. The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

   D. The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

III. Virginia's capital punishment statute, as interpreted by the Virginia Supreme Court, and as applied in this case, is unconstitutional.

A. Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

B. Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

C. Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

D. Virginia does not provide meaningful appellate review and did not in Buchanan's case.

E. Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

IV. The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

V. During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

VI. Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

VII. Buchanan was denied due process, assistance of counsel and the right to present evidence by the vague and inappropriate framing of the indictments.

A. Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

B. The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the number of indictments.

VIII. The trial court unconstitutionally denied Buchanan's motion for change of venue.

A. Pretrial publicity about the crimes and the trial of Buchanan's wife so tainted the local jury pool that a change of venue should have been granted.

B. Pretrial publicity which included wholly false accounts that the killings were committed for financial gain so tainted the local jury pool that a change of venue should have been granted.

IX. The trial court committed constitutional errors during jury *voir dire*.

A. The trial court refused to let defense counsel ask about jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

B. The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

C. The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them.

X. The trial court made constitutional errors regarding selection and sequestration of the jury.

A. The trial court failed to sequester the jury.

B. The trial court failed to grant additional peremptory challenges during jury selection.

XI. Imposition of the death penalty constitutes cruel and unusual punishment.

XII. Buchanan was denied effective assistance of counsel.

A. Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on grounds of double jeopardy.

B. Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

C. Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

D. Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

E. Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

F. Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

G. Counsel made evidentiary errors.

1. Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

2. Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

H. Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

XIII. Other constitutional violations:

A. The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

B. The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.

C. The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.

D. Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.

E. Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.

IV. OPINION OF THE COURT

A. Exhaustion and Procedural Bar

In reviewing the record, the court finds several of Buchanan's claims to be barred from federal *habeas* review under the doctrines of exhaustion and procedural default. A federal court may not grant a petition for writ of *habeas corpus*, pursuant to §2254, unless petitioner has exhausted the remedies available in the courts of the state which convicted him. §2254(b). To exhaust his state court remedies, a death penalty defendant in Virginia must present his claims to the Virginia Supreme Court, through one of the following methods. First, he appeals the conviction and sentence directly to the Virginia Supreme Court. Va. Code Ann. §17-116.05:1(B). Second, he can file a state *habeas* petition with the circuit court where he was convicted, with appeal of an adverse decision to the Virginia Supreme Court. Va. Code Ann. §8.01-654; §17-116.05:1(B). Finally, he can exhaust his remedies by filing a state *habeas* petition directly with the Virginia Supreme Court. Va. Code Ann. § 17-97. Buchanan has exhausted his state court remedies as to most of his claims by presenting them to the Virginia Supreme Court, either on direct appeal or in his state *habeas* petition and appeal therefrom or both.

Federal review of fully exhausted claims may be barred because petitioner has defaulted some state procedural rule. Where petitioner has failed to comply with a state procedural rule and the state supreme court has expressly relied on that procedural default as an adequate and independent state law ground for denying relief on a claim, federal review of

that claim is normally barred. See Harris v. Reed, 489 U.S. 255, 262 (1989) and Wainwright v. Sykes, 433 U.S. 72, 87 (1977). A federal court may review defaulted claims only if petitioner excuses his default through a showing of cause for the default and resulting prejudice or a showing of actual innocence. Harris, 489 U.S. at 262.

On direct appeal, the Virginia Supreme Court found several of Buchanan's claims barred under Virginia's contemporaneous objection rules. In its order denying Buchanan's appeal from the circuit court's denial of his state *habeas* petition, the Virginia Supreme Court found several claims, or parts of them, to be barred by the rule of Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974), cert. denied, 419 U.S. 1108 (1975).[9] Under the Slayton rule, claims which should have been raised at trial and/or on direct appeal, but were not raised at the proper time, cannot constitute grounds for state *habeas* relief. Id. Unless Buchanan can excuse his defaults of these claims, the court is barred from review of the merits even though the claims are exhausted. Harris, 489 U.S. at 262.

Ordinarily, in order to give state courts the opportunity to pass on the constitutionality of their criminal convictions and sentences, if a state *habeas* petitioner has not exhausted his available state remedies as to some of the claims raised in the federal petition, a federal court should dismiss the entire petition without prejudice to allow exhaustion of the claim before the state courts. Rose v. Lundy, 455 U.S. 509, 522 (1982). However, where a petitioner has not exhausted his state court remedies as to some claims, but has exhausted others, the federal court looks to applicable state law under which the state court would have ruled on the

[9]Analysis of exhaustion and procedural default in this case is complicated by the fact that the claims were numbered differently in state and federal proceedings, despite the fact that present counsel also represented petitioner in the state *habeas* proceedings.

unexhausted claims; if it is clear that the state's procedural law would now bar state review of the unexhausted claims, should petitioner attempt to exhaust his state court remedies, the federal court need not dismiss the petition to require complete exhaustion. Teague v. Lane, 489 U.S. 288, 297-98 (1989); Bassette v. Thompson, 915 F.2d 932, 936-37 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Nevertheless, federal review of the claim is barred, based on petitioner's default of the state procedural rules, unless petitioner demonstrates cause and prejudice or actual innocence to excuse the default. Teague, at 298; Bassette, at 937.

Part or all of certain claims in Buchanan's federal *habeas* petition have not been presented to any state court. Although these claims are not exhausted as normally required under §2254, they are based on facts which Buchanan knew or reasonably should have known at the time he filed his state *habeas* petition. Accordingly, the Virginia Supreme Court would now find all of these claims procedurally defaulted under Va. Code Ann. §8.01-654(B)(2). Under this statute, *habeas* relief cannot be granted in a later petition if petitioner knew or should reasonably have known all the facts necessary to those claims at the time he filed an earlier state petition. Id. Because the inevitable procedural default of Buchanan's unexhausted claims under §8.01-654(B)(2) serves as an adequate and independent state law ground on which the claims must be decided, this court need not dismiss the petition to allow exhaustion of these claims; nevertheless, the court is barred from review of the merits by the state procedural default, absent a valid excuse for the default. See Teague, 489 U.S. at 297-98; Bassette, 915 F.2d at 936-37. If Buchanan can demonstrate cause and prejudice for his procedural default of these claims, or show actual innocence, this court may address his unexhausted claims on the merits even though no state court has considered them.

As to several of these claims, Buchanan attempts to excuse his procedural default by arguing that ineffective assistance by his trial counsel caused the default by failing to raise the claim at trial. Ineffective assistance of counsel can constitute cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 488 (1986). However, petitioner must show that (1) the ineffective assistance itself was constitutionally significant, Strickland v. Washington, 466 U.S. 668, 687 (1984); (2) the ineffective assistance claim was presented to the state courts as required for exhaustion under §2254; and (3) the ineffective assistance claim itself has not been defaulted, Murray, at 488-89. See also Justus v. Murray, 897 F.2d 709, 713 (4th Cir. 1990). Under the principles of comity inherent in §2254, the Virginia court must have a meaningful opportunity to consider the ineffective assistance claim before this court may address it, as a substantive claim or as cause to excuse procedural default of another substantive claim.

Petitioner also argues that he should be excused from exhausting several of his claims because raising the claims to the Virginia courts was or would now be futile, as the Virginia Supreme Court had addressed similar issues in earlier cases and ruled against petitioner's position. Buchanan further asserts that if futility excused him from exhausting the claim in the first place, then procedural default is not even an issue since default occurs during the exhaustion process. It is the opinion of the court that, under controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, this argument fails.

In rare cases, exhaustion of §2254 claims before the state courts may be excused by futility. (1) If the procedural rule under which the state court has found or would find default

does not qualify as an independent and adequate state law ground upon which the claim must be decided and (2) exhaustion of the substantive claim before the state courts would be futile (because the state court has recently ruled decisively in a similar case against the legal theory supporting the claim), the federal court may reach the merits without dismissing the entire petition to require complete exhaustion, even if no state court has had opportunity to review the unexhausted claim. See Adkins v. Bordenkircher, 674 F.2d 279, 281 (4th Cir. 1982), cert. denied, 459 U.S. 853 and 459 U.S. 878 (1982). However, where a claim is clearly procedurally defaulted or would be procedurally defaulted if now raised to state courts, futility offers no excuse for petitioner's exhaustion errors. See id.; Engle v. Isaac, 456 U.S. 107, 129 (1982).

In Engle v. Isaac, the United States Supreme Court reaffirmed previous holdings that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." 456 U.S. at 129. Like Buchanan, Petitioner Isaac argued that he should be excused by the futility exception for failing to raise his claim properly to the state courts because state courts had already ruled decisively against similar legal arguments in an earlier case and would surely rule against his claim. The Supreme Court refused this excuse adamantly:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

Id. at 130. The court finds Engle and Bordenkircher to be consistent in holding that futility cannot excuse petitioner's failure to exhaust a *habeas* claim which is clearly procedurally defaulted, or would be procedurally defaulted if now presented to state courts, under a state procedural rule which serves as an adequate and independent state law ground for disposition of the claim.

The claims which Buchanan attempts to excuse under the futility argument were either found by the Virginia Supreme Court to be procedurally barred under Slayton, 205 S.E.2d at 682, or Supreme Court Rule 5.25, or would now be barred under §8.01-654(B)(2), as Buchanan has already filed one state *habeas* petition. These Virginia default rules have been repeatedly held to qualify as adequate and independent state law grounds disposing of claims before a court may reach the merits. See Bassette, 915 F.2d at 936; Whitley v. Bair, 802 F.2d 1487, 1501 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987); Johnson v. Muncy, 830 F.2d 508 (4th Cir 1987). Based on the foregoing, it is the opinion of the court that Buchanan cannot rely on the futility doctrine to excuse either his failure to exhaust or his procedural default of any of his claims.[10]

[10]Buchanan cites Nix v. Whiteside, 475 U.S. 157, 163 n. 3 (1986) as an indication that the United States Supreme Court still recognizes futility as an excuse for exhaustion of *habeas* claims. Footnote 3 in Nix recognized that the United States Court of Appeals for the Eighth Circuit and the district court had both found Petitioner Whiteside's *habeas* claim to be properly exhausted "since further proceedings would be futile." However, the Eighth Circuit based its refusal to require further exhaustion of Whiteside's ineffective assistance claim on two particular findings, unique to the facts of Whiteside's case: (1) the court found that further exhaustion of the claim would be futile because the state supreme court had "already determined that the state code of professional responsibility vindicated [petitioner's] counsel's actions and had in fact commended counsel for the 'high ethical manner' in which the matter had been handled"; and (2) as the ineffective assistance claim was so closely tied, factually and analytically, to federal due process and fair trial claims which Whiteside had already presented to the state court, the court found that the substance of petitioner's ineffective assistance claim had been presented to state courts sufficiently to satisfy §2254 exhaustion requirements as defined in Anderson v. Harless, 459 U.S. 4, 6 (1982)(see additional discussion, infra). Whiteside v. Scurr, 744 F.2d 1323, 1326-27 (8th Cir. 1984). In essence, the Eighth Circuit determined, the state supreme court had already addressed both the factual and the legal aspects of the ineffective assistance claim; accordingly, the court reasoned, the claim was exhausted and not defaulted, allowing

B. Analysis of Petitioner's Individual Claims

Claim I: During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

Petitioner argues that his right to due process was violated when the trial court excluded testimony at the sentencing phase of the trial upon the basis of hearsay. During that phase of the trial, petitioner attempted to elicit testimony from his expert witness, Dr. Robert S. Brown, Sr., as to the content of statements made to him by other individuals during the course of interviews conducted for the purpose of discovering Buchanan's mental and emotional history. Petitioner offered this testimony to provide factual support for Dr. Brown's expert opinion that the circumstances of petitioner's family history played a large role in his decision to kill certain members of his family. However, the Commonwealth objected to the admissibility of these out of court statements on hearsay grounds. The court sustained the objection but offered to allow Buchanan an opportunity to summon the declarants to testify as to their own statements. Counsel declined the offer and limited examination to questions directly addressing Dr. Brown's expert opinion.

Relying primarily on Green v. Georgia, 442 U.S. 95 (1979), petitioner maintains that the court should have permitted Dr. Brown to testify as to the statements on which he based his expert opinion. In Green, the Supreme Court held that a "mechanistic" application of state evidentiary rules at the sentencing phase of capital trial could rise to the level of a due process

federal review of the merits. Buchanan's case does not equate with the unique posture of Whiteside's case, and the mere use of the word "futile" by the Supreme Court in Nix does not magically legitimize Buchanan's futility arguments in the face of Engle and Bordenkircher.

violation if there existed factors weighing against strict application of the rules. Id. at 97. Petitioner contends that, without the support of the interviewees' statements, Dr. Brown's opinions were robbed of any persuasive effect they might have had. Petitioner argues that, in view of this detrimental impact on Dr. Brown's expert opinion and the absence of any indicia of unreliability, the application of the hearsay rule to Dr. Brown's proffered testimony was so mechanistic as to rise to the level of a due process violation.

In response to these arguments, respondent refuses to acknowledge that the exclusion of testimony upon the basis of a state evidentiary rule could rise to the level of a due process claim. While such a position is clearly in conflict with Green v. Georgia, supra, the court must nevertheless agree that the application of the hearsay rule in this particular instance does not rise to the level of a constitutional violation. In Green, the Supreme Court dealt with a situation in which a state court had excluded testimony at the sentencing phase of a criminal trial upon the basis of hearsay, even though it had admitted this same testimony at the guilt phase of a codefendant's trial. The testimony at issue involved an out of court statement proffered to show that the defendant had not been physically present when the victim had been killed by his codefendant. Consequently, the out of court statement bore upon a precise factual issue which was highly relevant to the defendant's culpability. Moreover, the proffered statement in Green had been uttered by the codefendant under circumstances in which there was no indication of ulterior motive, thus lending the statement a great deal of reliability. 442 U.S. at 97.

Although it cannot be denied that facts relayed by individuals who personally knew a capital defendant may also be highly relevant to whether the death penalty should be imposed,

the statements in Buchanan's case were only offered to support an expert's opinion that was, in fact, presented to the jury. The statements at issue, therefore, would have born only indirectly on petitioner's character and culpability and, as such, would have been of somewhat limited probative value. Yet, there was no assurance of reliability other than petitioner's representations that the declarants had no reason to be untruthful given the purpose of Dr. Brown's interviews. Accordingly, the statements in this case were not only less probative, but also bore fewer indicia of reliability than did the statement in Green.

Furthermore, and perhaps even more importantly, the court gave Buchanan every opportunity to call those individuals whom he felt were essential to proving the existence of mitigating circumstances. He cannot now complain that the court erred by prohibiting the admission of hearsay when he had the option of introducing the direct testimony of the declarants themselves. If the testimony of these individuals was important to the demonstration of a mitigating factor, petitioner's counsel would clearly have taken the time to call those individuals into court. Indeed, even without the opportunity to quote statements made by the persons whom he had interviewed, Dr. Brown was able to provide a lengthy and detailed history of petitioner's mental and emotional history. Accordingly, the court must deny relief on Claim I of the petition.

Claim IIA: The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

Petitioner next contends that the jury instructions at the sentencing phase of the trial were inadequate to inform jurors of all the mitigating factors which they could consider in

determining whether the death penalty should be imposed. However, a federal court should avoid attempting "to prescribe the particular form which state jury instructions on mitigation must take." Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985). In fact, in Jones v. Murray, 947 F.2d 1106 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992), the Court of Appeals for the Fourth Circuit reviewed jury instructions substantially similar to the instructions at Buchanan's trial and found that they satisfied the requirement for individualized sentencing under the Eighth and Fourteenth Amendments.[11] Specifically, the court in Jones held that an instruction directing a jury to consider "all the evidence" was sufficient to assure that the jury would weigh both mitigating and aggravating factors. 947 F.2d at 1120. In reaching its conclusion that the instructions were constitutionally adequate, the Fourth Circuit also noted favorably that the statutory verdict form used at Jones' trial, which was identical to the one used at petitioner's trial, required the jury to recite that it

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[11]In Jones, the court gave the following instructions to the jury:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible or inhuman, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> The Court instructs the Jury that even if you believe beyond a reasonable doubt that such facts and circumstances have been proven as to permit the Death Penalty, it is still the prerogative of the Jury to decide whether death should be the punishment or not, and the Jury is under no obligation or compulsion to find the punishment should be death.

947 F.2d at 1120.

In Buchanan's case, the trial court gave the following instructions to the jury:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that [the Defendant's] conduct in committing the murders...was outrageously or wantonly vile, horrible or inhuman, in that it involved torture depravity of mind or aggravated battery to...the victims, or to anyone of them.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or *if you believe from all the evidence that the death penalty is not justified*, then you shall fix the punishment of the defendant at life imprisonment.

(emphasis added)

had "considered the evidence in mitigation of the offense." Id. Accordingly, the court must deny relief on this ground.

Claim IIB: The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

The Virginia Supreme Court expressly held that this claim was procedurally barred from state *habeas* review under the rule of Slayton v. Parrigan. 205 S.E.2d at 682. Buchanan admits that he did not litigate this claim at trial. Although counsel submitted several proposed jury instructions regarding mitigation evidence, which the court refused, they did not request an instruction stating that the jury need not unanimously agree upon particular mitigating factors in order to find mitigation of the death sentence.

Buchanan argues that his undisputed procedural default of this claim at trial should be excused because counsel provided constitutionally ineffective assistance when they failed to propose a unanimity instruction. However, petitioner did not present this ineffective assistance argument to the Virginia courts during *habeas* proceedings and does not present any excuse here for his failure to do so. As an unexhausted and defaulted ineffective assistance claim cannot serve as cause to excuse any other procedural default, the court is barred under the doctrine of procedural default from reviewing the merits of Claim IIB. See Justus, 897 F.2d at 713.

Claim IIC: The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

Likewise, procedural default bars the court from reviewing the merits of this claim. Buchanan's trial counsel did not object to the penalty phase instruction on "vileness." Because

Buchanan never presented this claim to Virginia courts and would be barred from doing so now under Va. Code Ann. §8.01-654(B)(2) and Slayton, 205 S.E.2d at 682, the claim is also barred from review before this court unless Buchanan demonstrates sufficient excuse for his default. Teague, 489 U.S. at 297-98; Bassette, 915 F.2d at 936-37.

Buchanan argues that counsel's omission at trial represented constitutionally ineffective assistance of counsel which should serve as excuse for his default of the claim at trial and on direct appeal. However, Buchanan never presented to Virginia courts his ineffective assistance argument as cause to excuse his trial default of this claim, so the ineffective assistance claim itself is unexhausted and procedurally defaulted.. See Justus, 897 F.2d at 713. As a defaulted ineffective assistance claim cannot excuse petitioner's failure to present Claim IIC to Virginia courts, this court is barred from considering Claim IIC on the merits.

Claim IID: The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

Buchanan bases his argument under Claim IID solely on evidence already presented in Claims IIA, IIB, and IIC. He asserts that jury instructions in his case, viewed in totality, were constitutionally inadequate because they failed to guide the jury in deciding both the aggravating factor (vileness) and mitigating factors, making the jury's verdict unreliable and, therefore, unconstitutional. The court has already determined above that instructions regarding mitigation were constitutionally adequate and that the claims regarding unanimity and vileness instructions are procedurally barred from federal *habeas* review. As petitioner has not presented any other argument or evidence in support of his totality claim, it, too, must be dismissed as meritless.

Claim IIIA: Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

Buchanan's third claim is that the Virginia capital punishment statute, as interpreted by the Virginia Supreme Court and as applied in his case, is unconstitutional. As part of this claim, Buchanan argues that Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in his case.

The United States Supreme Court held in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), that if a state wishes to authorize capital punishment, it has a constitutional responsibility to tailor the law to avoid "the arbitrary and capricious infliction of the death penalty." The state must channel the discretion of the sentencer by providing the guidance of clear and objective standards for imposing the death penalty. Id. Because the proper degree of definition of these eligibility factors often "'is not susceptible of mathematical precision,' a review for vagueness is quite deferential." Tuilaepa v. California, 114 S.Ct. 2630, 2635 (1994), citing Walton v. Arizona, 497 U.S. 639 (1990). Under these standards, the Virginia capital punishment statute[12] has been upheld against constitutional vagueness challenges on several occasions. See, e.g. Hoke v. Commonwealth, 377 S.E.2d 595 (Va. 1989), cert. denied, 491 U.S. 910 (1989); Pope v. Commonwealth, 360 S.E.2d 352 (Va. 1987), cert. denied, 485 U.S. 1015 (1988); Gray v. Commonwealth, 356 S.E.2d 157, cert. denied, 484

[12]The death penalty statute, Va. Code Ann. § 19.2-264.2, provides:
In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.
In the case at hand, the jury was instructed only as to the vileness aggravator, and not on future dangerousness.

U.S. 873 (1987); Stockton v. Commonwealth, 314 S.E.2d 371, cert. denied sub nom Stockton v. Virginia, 469 U.S. 873 (1984); see also Gregg v. Georgia, 428 U.S. 153, 201 (1976) (no indication that reviewing court would construe vileness factors in Georgia statute so broadly that they could encompass any murder). The terms of the Virginia statute require that, in order to assess the death penalty upon a defendant convicted of capital murder, the sentencer must find either that the defendant poses a threat of future dangerousness or that the crime committed was outrageously or wantonly vile, horrible, or inhuman. The vileness aggravator is further defined in the statute as involving "torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2.

In Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978), cert. denied sub nom Smith v. Virginia, 441 U.S. 967 (1979), the Virginia Supreme Court reasoned that the language defining the vileness aggravator, when given a reasonable and natural interpretation, accomplished the Virginia legislature's intent to be selective in choosing the types of intentional homicide that would be subject to punishment by death. The court upheld the death penalty statute against petitioner's facial challenge. The court went on, however, to explain how the vileness factors should be interpreted:

> [W]e construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. . . . [W]e construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish and act of murder. . . . It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman."

Id. (citations omitted).

Following Smith, most cases addressing the issue of vague instructions or verdict forms in Virginia capital murder cases found that the trial court had included the explanatory language provided in the Virginia Supreme Court's opinion. In the federal courts, Virginia's vileness aggravator has been upheld in cases where the jury was instructed as to the meaning of the elements of the aggravator. See, e.g. Gray v. Thompson, 58 F.3d 59, 63 (4th Cir. 1995) (limiting instructions based on Smith meet constitutional standards); Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) (same), cert. denied sub nom Turner v. Jabe, 115 S.Ct. 1359 (1995); Turner v. Bass, 753 F.2d 342, 353 (4th Cir. 1985) (jury instructed on meaning of "aggravated battery," but jury need not be instructed on each term of the vileness aggravator), reversed in part on other grounds, 476 U.S. 28 (1986). The Virginia Supreme Court has upheld the constitutionality of the vileness aggravator where the jury was instructed only on the bare words of the statute. In Clark v. Commonwealth, 257 S.E.2d 784, 790 (Va. 1979), cert. denied, 444 U.S. 1049 (1980), petitioner objected that the trial court had failed to define the terms of the statute in its sentencing instructions. At trial, the court explained that it felt the terms of the statute were a matter of common knowledge, but offered to consider any definitional instructions that counsel chose to submit. No instructions were submitted (in acceptable form), so none were given. The Virginia Supreme Court upheld the trial court's decision regarding the instructions, saying:

> We agree with the trial court that the terms used in the statute are commonly used and each has an accepted meaning. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error. Although in our review of this case we are guided by our definitions in Smith, it does not necessarily follow that these particular definitions were necessary for the jury to determine whether the conduct of [the defendant] was outrageously or wantonly vile,

horrible, or inhuman in that it involved depravity of mind or aggravated battery of the victim.

Id. at 790-91; see also Coppola v. Commonwealth, 257 S.E.2d 797, 804 (Va. 1979), cert. denied, 444 U.S. 1103 (1980) (not imperative that court define the words used in capital punishment statute; instructions which do not use precise language of Smith are not incorrect).

The instructions given in Buchanan's case resemble those given in Clark -- the trial court simply read the language of the statute as its instruction to the jury. It provided the jury with a verdict form which contained essentially the same language as the statute.[13] The trial court instructed the jury that, having found Buchanan guilty to capital murder, they must determine whether to impose a sentence of death or life in prison. Future dangerousness was not considered, but the court directed that

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McARTHUR Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

(Tr. Trans., v.6, p.1580). Although the instructions did not include further explanation, it is presumed that the Virginia Supreme Court incorporated the Smith interpretation in its direct and independent review of the trial and sentencing records. The Supreme Court concluded

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[13]The verdict form for the capital murder sentencing read:
We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

that the evidence of guilt was sufficient to uphold the conviction, and that the same evidence was relied upon during the penalty phase to support the imposition of the death penalty. Buchanan, 384 S.E.2d at 774. "We hold that this death sentence was not imposed arbitrarily or on the basis of passion or prejudice." Id.

While the court believes the trial court might have explained the vileness aggravator beyond the language provided in the statute, it was not constitutionally required to do so. Even had the jury been misled or confused by the instruction, the appellate process assured that constitutionally narrow construction of the vileness aggravator was applied to the facts in this case. See Walton, 497 U.S. at 655-56; see also Lewis v. Jeffers, 497 U.S. 764, 779 (1990) ("Our decision in Walton thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' has been satisfied." (citations omitted)); Turner v. Williams, 35 F.3d at 893. Petitioner's claim that the aggravating factor of vileness was unconstitutionally vague as applied to his case is without merit.

Claim IIIB: Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

Petitioner next argues that, because a jury may find an offense to be "vile" without reference to a capital defendant's prior history and character and because the Virginia Supreme Court has no mechanism by which to give effect to mitigating circumstances when there is such a finding, petitioner was deprived of an adequate appellate review of his sentence by

Virginia's capital sentencing scheme. In Turner v. Williams, the Fourth Circuit Court of Appeals reviewed Virginia's capital sentencing scheme under circumstances in which the jury had cited the "vileness" factor as its basis for imposing the death penalty. The Fourth Circuit held in Turner that Virginia provides meaningful appellate review for its death penalty cases. Specifically, the Turner court found that the Virginia Supreme Court's (1) determination of whether the imposition of the death penalty in a particular circumstance is the product of passion, prejudice or some other arbitrary factor, coupled with (2) a consideration of whether the penalty was excessive, in light of both the offense and the defendant himself and in relation to the punishment imposed in similar cases, satisfies the constitutional requirement of meaningful appellate review in death penalty cases. 35 F.3d at 893, citing Va. Code Ann. §17-110.1(C).[14]

In Buchanan's case, the Virginia Supreme Court, after hearing arguments and conducting an independent review of the record, specifically held that the death penalty had not been imposed as a result of the passion, prejudice or arbitrariness. The court also concluded that the imposition of the death penalty, under the particular circumstances of petitioner's offense, was not excessive or disproportionate. Although the court made no reference to petitioner's character or personal history, it was clearly authorized to take those factors into consideration under the provisions of Virginia Code §17-110.1(C); the statute

[14]Section 17-110.1(C) reads, in relevant part, as follows:
In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

requires the appellate court to review the excessiveness of punishment while also "considering both the crime and the defendant." The court also stated specifically that its review process included consideration of the transcripts from Buchanan's sentencing hearing at which he presented his mitigation evidence.

Petitioner simply did not argue that his sentence was disproportional when viewed in the context of his own personal history. Rather, he challenged the procedures under which the death penalty was imposed at the sentencing phase of his trial. Petitioner cannot now bemoan the Virginia Supreme Court's failure to address all the mitigating circumstances of his offense when he himself did not even raise them as grounds upon which his death penalty should have been overturned. Accordingly, the court must deny relief on this ground, as well.

Claim IIIC: Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

Buchanan admits that this claim was procedurally defaulted because it was not raised at trial; the Virginia Supreme Court also expressly held that the claim was barred from *habeas* review under Slayton v. Parrigan. 205 S.E.2d at 682. Petitioner argues that as any competent trial counsel would have objected to the verdict form, counsel's incompetent omission should serve as cause to excuse default of the claim. However, Buchanan did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. The ineffective assistance aspect of the claim is thus defaulted, Justus, 897 F.2d at 713, petitioner has failed to show cause for his default of the verdict form claim, and this court is barred from considering it on the merits. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Claim IIID: In capital murder/death sentence cases, Virginia does not provide meaningful appellate review and did not in Buchanan's case.

Buchanan admits that, on direct appeal, he did not raise either a general challenge to the Virginia Supreme Court's review of death sentences or a specific challenge to the court's general review of his own sentence. When he raised these claims in *habeas* proceedings, the Virginia Supreme Court expressly held them barred under the rule of Slayton v. Parrigan. 205 S.E.2d at 682. Buchanan argues that it is absurd to expect a defendant to challenge the quality of appellate review in his own case in the very petition requesting that appellate review. The court must agree.

To serve as an independent and adequate state law ground sufficient to bar federal *habeas* review, a state procedural rule cannot force litigants to "resort to an arid ritual of meaningless form." Osborne v. Ohio, 495 U.S. 103, 124 (1990)(citations omitted). At the time he files an appeal of his death sentence, an appellant cannot know the quality of appellate review that will be given to that appeal. A rule forcing him to challenge the appeal in the appeal prevents him from bringing any factual support to his argument and requires him to assume that the appeal will be denied. Such a rule is not only illogical, but also tantamount to an admission that appellate review of death sentences is a meaningless ritual in Virginia, as the outcome is a foregone conclusion. An illogical and meaningless procedural requirement cannot stand as an independent and adequate state law ground to which a federal court must defer in *habeas* review.

Based on the foregoing, the court finds that Buchanan is procedurally barred at this point from raising a general challenge to the quality of appellate review of death sentences in

Virginia or to the constitutionality of the Virginia statute requiring appellate review of death sentences, Va. Code Ann. § 17-110.1(C),[15] as he could have raised such a claim on direct appeal, but did not. See Coleman, 501 U.S. at 750. However, the court also finds that to the extent which this claim challenges the appellate review of Buchanan's own death sentence, the claim is not procedurally barred. At the same time, the court must limit its review of the claim to those arguments and evidence presented to the state courts.

In support of his claim, Buchanan presents an affidavit from attorney Robert Godfrey concerning multiple murder cases decided by the Virginia Supreme Court at or before the time of Buchanan's appeal. Petitioner did not submit this affidavit to the state courts which have reviewed this claim, explaining merely that there was no point since the state courts would only find the claim procedurally barred under Slayton v. Parrigan. 205 S.E.2d at 682. Given Buchanan's strong argument that he could not effectively argue a claim about his own appeal in his appeal, it is conceivable that the Virginia *habeas* courts would have accepted this excuse and addressed his claim on the merits, had he also presented factual support for it. To present the claim before the state courts without all the supporting evidence denies those courts a meaningful opportunity to consider the claim itself and ignores the very purpose of the exhaustion requirement of §2254. As Buchanan offers no valid excuse for his failure to present Mr. Godfrey's affidavit to the state courts, this court is barred from considering it.

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[15]"In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Keeney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992). This court must consider the claim solely based upon the facts which were also presented to the state *habeas* courts. Specifically, Buchanan alleges that 1) the Virginia Supreme Court did not adequately consider mitigating factors evidence, in determining whether the death sentence had been imposed arbitrarily, and 2) did not properly apply the Virginia proportionality review as required by statute. Va. Code Ann. § 17-110.1(C).

Federal constitutional protections in the death penalty context simply require that the death penalty not be imposed by a state in an arbitrary or capricious manner. Godfrey v. Georgia, 446 U.S. at 428. There is no constitutional right to any specific type of state appellate review of death sentences, although most of the statutes which have been upheld as constitutional include provisions for prompt and automatic appeal as one aspect of ensuring that the a death sentence was not arbitrarily or capriciously imposed. See Pulley v. Harris, 465 U.S. 37, 49-51 (1984). Thus, petitioner's claim must be analyzed on two fronts: 1) whether the Virginia Supreme Court correctly applied Virginia law in Buchanan's death penalty case and 2) whether the review petitioner received was adequate to satisfy the federal protections set forth in Godfrey.

The rule in Virginia is that the mitigating factors mentioned in the statute are not listed for the sentencer so that the jury is not misled into thinking those factors are the only ones which may be considered. Watkins v. Commonwealth, 331 S.E.2d 422, 438 (1985), cert. denied, 475 U.S. 1099 (1986). See also Zant v. Stephans, 462 U.S. 862, 890 (1983)(states not constitutionally required to adopt specific standards for instructing jury in its consideration of mitigating circumstances). Thus, there is no appellate review right in Virginia to determine

whether the jury's sentencing verdict complied with the mitigating factors listed in the Virginia Code. Indeed, the exclusion of evidence which prevents the sentencer from considering any mitigating factor or other relevant circumstance that could cause it to decline imposing death would run afoul of the federal guarantee that all those subject to the death penalty be treated as "uniquely individual human beings." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (emphasis added); see McCleskey v. Kemp, 481 U.S. 279, 306 (1987)(state cannot limit sentencer's consideration of any relevant circumstance that could cause it to decide against imposing death).

All that is required under Virginia law, then, is appellate review to determine if the sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." Va Code § 17-110.1(C)(1). As discussed in Claim IIIB above, the Virginia Supreme Court analyzed the record of petitioner's sentencing and found that the death sentence was not arbitrarily imposed. Buchanan, 384 S.E.2d at 774. This court has undertaken an independent review of the sentencing phase transcript of Buchanan's trial and does not find fault with the decision of the Virginia Supreme Court. The sentencing jury heard numerous witnesses tell them about Buchanan's family background: how he was "cut off" from visiting, seeing, or talking to any of his maternal relatives when his mother died and his father re-married, how his grandparents had to go to court for the right to even visit with petitioner for four hours a week, about his father's and step-mother's difficulties with alcohol, about the number of times petitioner ran away from home, and about how that background affected his mental stability. They also heard about how Buchanan regularly attended church, that petitioner turned to substance abuse because of his family problems, about his honorable service in the

Army, about the role Christianne Buchanan may have played in encouraging petitioner to kill his family, and about what mental state Buchanan may have been in when he first started arguing with his father on the date of the killings. As the Virginia Supreme Court must have reviewed this evidence when reviewing the sentencing transcript, this court finds that Buchanan received an adequate appellate review of his death penalty case, including all mitigation evidence, in satisfaction of Virginia law and in satisfaction of the federal guarantee that the death penalty be imposed in a non-arbitrary manner.

Nor does Buchanan state a cognizable claim on the question of proportionality review by the Virginia Supreme Court. There is no federal right to proportionality review in a state death penalty case. Pulley v. Harris, 465 U.S. at 50-51. Petitioner's federal proportionality claim is, therefore, reduced to a question of due process -- whether the Virginia Supreme Court properly applied the proportionality statute, § 17-110.1(C), in his case. In determining whether a sentence of death is excessive, or disproportionate, the state supreme court need inquire only whether juries in the jurisdiction generally approve the supreme penalty for comparable or similar crimes. Pruett v. Commonwealth, 351 S.E.2d 1, 14 (1986), cert. denied, 482 U.S. 931 (1987). In Buchanan's case the Virginia Supreme Court stated:

> We have accumulated death penalty cases involving Code § 18.2-31(g), and other death penalty cases involving death by gunshot where the death penalty was based on vileness, and we conclude that juries in Virginia customarily impose the death sentence in cases of this kind.

Buchanan, 384 S.E.2d at 774 (citations omitted).

The Fourth Circuit, in its consideration of Coleman v. Thompson, 895 F.2d 139, 146-47 (4th Cir. 1990), aff'd, 501 U.S. 722 (1991), found that the Virginia Supreme Court's

decision not to commute the petitioner's death sentence was supported by its "independent . . . determin[ation] that the sentence of death was properly imposed." The Fourth Circuit held that the Virginia court's review of Coleman's death sentence under Va. Code Ann. § 17-110.1(c) satisfied the constitutional requirements of channeling and limiting the sentencer's discretion to impose the death sentence. Id.

The proportionality review conducted by the Virginia Supreme Court in Coleman's case was nearly identical to that court's proportionality review of Buchanan's death sentence. See Coleman v. Commonwealth, 307 S.E.2d 864, 877 (Va. 1983), cert. denied, 465 U.S. 1109 (1984); cf. Buchanan, 384 S.E. 2d at 774. The Fourth Circuit found that this proportionality review satisfied the requirements of Va. Code Ann. § 17-110.1(C). Coleman, 895 F.2d at 147. Thus, it is clear that Buchanan received the full extent of proportionality review to which he was entitled under Virginia law, and, accordingly, that he was not denied due process in violation of the Fourteenth Amendment.

Claim IIIE: Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

All of petitioner's arguments in support of this claim are simply repetition of earlier claims which the court has found to be procedurally barred from federal review or to be without merit. Accordingly, this claim also must be dismissed.

Claim IV: The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

Respondent argues that this claim is procedurally barred from federal review because when Buchanan presented it on direct appeal, he did not assert that failure to instruct the jury on second degree murder violated his federal constitutional right to due process. It is clear

that the Virginia Supreme Court analyzed the claim as though it were brought under Virginia law only and found it meritless. In his *habeas* pleadings, Buchanan repeated the claim, but added language contending that failure to give the instruction violated his federal constitutional right to due process. In denying *habeas* relief, the state circuit court found that the federal constitutional claim was barred by the default rule of Slayton v. Parrigan. 205 S.E.2d at 682. The Virginia Supreme Court also applied the Slayton rule to the second degree murder instruction claim "to the extent [it] advance[d] matters not asserted on direct appeal." Petitioner argues that because the state and federal claims are all but identical in factual and legal analysis, he has presented the Virginia Supreme Court with the substance of the federal claim in satisfaction of the §2254 exhaustion requirement.

The United States Supreme Court has expressly held that §2254 requires a federal *habeas* petitioner to present the state courts with a "fair opportunity" (1) to address the "substance of his federal *habeas corpus* claim" and (2) "to apply controlling legal principles to the facts bearing upon" that claim. Anderson v. Harless, 459 U.S. 4, 6 (1982), citing Picard v. Conner, 404 U.S. 270, 276-78 (1971). See also Duncan v. Henry, 115 S.Ct. 887, 888 (1995)(citing Harless, held that failure to exhaust federal due process aspect of *habeas* claim regarding state trial court's evidentiary ruling was insufficient to satisfy §2254 exhaustion requirement). "It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim" was presented to them. Harless, 459 U.S. at 6. Petitioner's presentation of his claim must "fairly apprise a reviewing court of a potential federal claim" or he has failed to satisfy §2254 exhaustion requirements. Id. at 7 n. 3.

After review of Buchanan's direct appeal, the court finds that his presentation of his second-degree murder instruction claim did not "fairly apprise" the Virginia Supreme Court that he was raising the claim under both Commonwealth law and federal constitutional law. He does not mention the words "federal" or "constitutional" nor does he cite any federal case law in his argument supporting the claim. Under Harless and §2254, this court must find that Claim IV as raised in this petition was not adequately presented in Buchanan's direct appeal to satisfy exhaustion requirements. Although Buchanan has now exhausted the federal claim by presenting it to the state courts during *habeas* proceedings, he offers no viable excuse for his procedural default of the claim on direct appeal. Accordingly, the Virginia Supreme Court denial of *habeas* relief under Slayton serves as an independent and adequate state law bar to federal review; this court is barred from review of the merits of Claim IV. Coleman, 501 U.S. at 750.

Petitioner apparently argues that the court should recognize an exception to the strict pleading requirements set forth in Harless where, as here, the state and federal claims are all but identical. See Briley v. Bass, 742 F.2d 155, 165 (4th Cir. 1984), cert. denied, 469 U.S. 893 (1984)("Virginia and the Circuit and the Supreme courts agree that lesser-included offense instructions are not required where . . . there is no support for such instructions in the evidence"). See also Hopper v. Evans, 456 U.S. 605, 611-12 (1982)(federal rule is that lesser included offense instruction need be given only if evidence would permit jury rationally to find defendant guilty of the lesser offense and acquit him of the greater). The court cannot agree. Before the Virginia Supreme Court, Buchanan clearly sought relief under state law. He gave

the state court no inkling of an intention to implicate the broader reaches of federal due process law as well.

Even assuming that the federal constitutional claim were not procedurally barred, the court finds no merit to the claim. To convict a person of first degree murder, where felony murder is not involved, the prosecution must prove that the killing was "willful, deliberate, and premeditated." Va. Code Ann. §18.2-32. Therefore, to prove entitlement to a second-degree murder instruction, petitioner would have to demonstrate that the evidence at trial supported a rational finding by the jury that Buchanan did not form an intent to kill each of his four victims before inflicting the fatal wounds upon them. See Smith v. Commonwealth, 261 S.E.2d 550, 553 (Va. 1980)(to premeditate means to adopt a specific intent to kill, and premeditation is what distinguishes first and second-degree murder).

On direct appeal, the Virginia Supreme Court addressed the issue of whether the evidence supported a second degree murder instruction as to his father's killing, reviewing in detail Buchanan's various attempts to explain his state of mind and why the killings happened. In the end, the court held:

> We are of the opinion that Buchanan was not entitled to a second degree murder instruction regarding his father's murder. This murder was planned. The only reason it was not carried out the day before was because Buchanan made a conscious decision not to do it at that time. But, the next day, he returned to his father's house prepared to kill and intending to kill. Buchanan did not say he killed in anger. He did not say he felt provoked. He did not say he shot without thinking. His father had broken off the disagreement and turned his back to walk out the door when Buchanan - having time to think and, by his own admission, intending to kill - shot him in the back of the head. "A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill." Giarrantano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980). See Barnes v. Commonwealth, 234 Va. 130, 136, 360 S.E.2d 196, 201 (1987); Bradshaw v. Commonwealth, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939). Once his father fell,

> Buchanan shot him between the eyes. In our view, Buchanan relies on but a scintilla of evidence to support his motion for a second degree murder instruction; this is not enough. The evidence to which he points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that Buchanan acted without premeditation.

Buchanan, 384 S.E.2d at 770-71. This court is not bound under §2254 to presume these findings correct, as the issue at stake is a mixed question of law and fact, requiring de novo review of both. However, after review of the record, the court fully agrees with the Virginia Supreme Court's findings.

From the physical evidence alone, a jury could not rationally have found that Buchanan did not form an intent to kill each of his victims. All of the victims had multiple wounds; even if an initial wound was inflected unintentionally or in the heat of anger or hurt, his subsequent attacks on each of the victims demonstrate an intent to kill that victim. After shooting his father, and later Donnie, once in the head, he fired a single, follow up shot into each victim's head at point blank range. When J.J. got up after a shot to the head, Buchanan went in the other room to get a knife and stabbed the boy numerous times until he could no longer get up. Buchanan admitted in statements his intent to kill Geraldine. He covered all trace of the killings in the livingroom and paced the floor, waiting for her to come home, his weapons at the ready. He stated, "I wasn't going to leave there until I killed her." And he has never denied wearing rubber gloves the entire afternoon during the killings; this fact alone is a strong indication of premeditation, as the only common sense reason to wear gloves when going to the house was to prevent leaving fingerprints at the scene of an intended crime.

Buchanan's testimony about his state of mind is both inconsistent with his physical acts and insufficient to support a rational finding of anything less than intent to kill. He testified

that he did not plan to kill that afternoon, but also testified to specific planning he and Christianne had done the previous evening. He testified that "it just happened" and that he went "crazy" after killing his father, but the fact that he does not understand his actions now cannot counteract other testimony and physical facts indicating that he had, in fact, formed an intent to kill each victim before inflicting a fatal wound. Buchanan said that he was ready to leave when the boys came home, blocking his escape through the front door, but he did not leave or explain why he could not have left out another door. He admitted that nothing anyone had done "set it off at this particular time." Simply put, the court is of the opinion that nothing in the evidence provided basis upon which a jury could rationally have found Buchanan guilty of anything less than first degree murder and that Buchanan is not entitled to *habeas* relief on this claim. Hopper, 456 U.S. at 611-12.

Claim V: During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

Buchanan admits that counsel failed to submit any instruction to the trial court concerning a definition of transaction or to argue on direct appeal that the court erred in failing to give such an instruction. In denying petitioner's *habeas* appeal, the Virginia Supreme Court expressly held the claim barred under the default rule of Slayton. Even if Buchanan contends that the default was caused by constitutionally ineffective assistance of counsel, as he failed to raise these allegations about counsel before the state courts in any proceeding, the ineffective assistance claim is defaulted and cannot serve as cause to excuse the default of the underlying claim itself. Justus, 897 F.2d at 713. Thus, this court is barred from addressing Claim V on the merits. Coleman, 501 U.S. at 750.

Claim VI: Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

In Claim VI, petitioner asserts that the multiple murder provision of Virginia's capital murder statute is unconstitutionally vague, because it fails to define the word "transaction." Section 18.2-31 of the Virginia Code provides, in pertinent part:

> Capital murdered defined; punishment. The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> . . .
>
> 7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction.[16]

Buchanan contends that the word "transaction" is susceptible to many different definitions and interpretations. As a result, he claims that the use of the word "transaction" in Virginia Code § 18.2-31(7), when applied to his case, violated his Sixth, Eighth, and Fourteenth Amendment rights. Challenging the statute on its face, petitioner argues that the language of the statute encompasses such a broad spectrum of behavior that it does not sufficiently limit the circumstances for which a defendant could become eligible for the death penalty. The Commonwealth responds that the statute was sufficiently clear to have put petitioner on notice that his conduct was prohibited.

The vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v.

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[16]The subsections of Va. Code § 18.2-31 were recently renumbered. At the time petitioner committed the murders, the relevant subsection was designated as subsection (g). This subsection was originally added to the capital murder statute in 1981, and was intended to add multiple murders as a crime that qualified for capital treatment. The language of the renumbered section is identical.

Lawson, 461 U.S. 352, 357 (1983) (citing Hoffman Estates v. Flipside, 455 U.S. 489 (1982); Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926)). The United States Supreme Court in Kolender further explained that:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, 415 U.S. at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. at 575.

461 U.S. at 357-58. Based on this analysis, the loitering statute at issue in Kolander was voided for vagueness because it did not explain what was intended by the requirement that an individual present police officers with "credible and reliable" identification upon being stopped and questioned. Id. at 361. "[The statute] is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." Id.

The Virginia courts have adopted the vagueness standards and rationale of the federal courts. In Flannery v. City of Norfolk, 218 S.E.2d 730, 733 (Va. 1975), the Virginia Supreme Court adopted the words of the United States Supreme Court to explain that:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

(quoting Colton v. Kentucky, 407 U.S. 104, 110 (1972)). The Virginia court also noted that it would consider whether the words at issue in a vagueness challenge have a well-settled common law meaning and whether the language has been narrowed through judicial decisions. Id.

The Virginia Supreme Court applied these standards when it examined the same capital murder provision now challenged by petitioner. In Woodfin v. Commonwealth, 372 S.E.2d 377 (Va. 1988), the state court rejected the criminal defendant's contention that the phrase "same act or transaction" as used in the capital murder statute is unconstitutionally vague.[17] An analysis of the statutory language showed that it was sufficient to give an ordinary person notice that his contemplated conduct was forbidden and that the statute did not encourage selective law enforcement. Id. at 379. The court stated:

> In the context of this statute, there is nothing uncertain or ambiguous about the phrase "same act or transaction" when applied to defendant's actions. The language is synonymous with "same criminal episode." State v. Boyd, 533 P.2d 795, 799 (1975). In other words, two offenses arise out of the "same act or transaction" if they are connected so closely "in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge." State v. Fitzgerald, 516 P.2d 1280, 1284 (1973).
>
> In the present case, the evidence shows that two murders were committed at the same location, about the same time, and under the same circumstances. Therefore, given his conduct, the defendant reasonably should have been on notice that the statute applied to his actions when it defined capital murder as killing "more than one person as a part of the same act or transaction." Thus, the statute satisfies the constitutional requirement

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[17]More specifically, the court in Woodfin rejected the facial challenge to the statute outright, concluding that the defendant/appellant had no standing to make such a challenge where he did not contend that his conduct was constitutionally protected or that the First Amendment was implicated. 372 S.E.2d at 379. The court addressed only the narrow question of whether the statute was vague as applied to the defendant/appellant's conduct in that case. Id.

of definiteness and complies with the standard forbidding arbitrary and erratic law enforcement.

Id. at 379.

Petitioner argues that the holding in Woodfin should not influence the vagueness analysis in his case, since Woodfin was decided months after petitioner was convicted and sentenced. He asserts that at the time he committed his crimes, the statutory language was unclear as to what conduct would be considered part of the same "transaction." In short, petitioner contends that because there was no judicial limitation placed upon the statutory language at the time he committed the murders, the statute was unconstitutionally vague as applied to him.

The court rejects this argument, and agrees with the Commonwealth that the language of the statute itself was sufficiently clear to notify the defendant that his course of conduct was prohibited. As the Virginia Supreme Court found during consideration of petitioner's direct appeal, the "four murders were committed at the same place, under the same circumstances, within a narrow time span." Buchanan v. Commonwealth, 384 S.E.2d at 771. Therefore, as applied to petitioner, the term "transaction" clearly encompassed all of the criminal acts committed over the time span during which the murders occurred. A person of ordinary intelligence who was in petitioner's position at the time the murders were committed certainly would have understood that the statutory language prohibited those acts. Furthermore, in the situation at hand, there is no support for the proposition that the capital murder statute was enforced in an arbitrary manner. As the court is of the opinion that the Virginia statute passes

constitutional scrutiny under the vagueness doctrine, petitioner is not entitled to relief on this claim.

Claim VIIA: Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

In Claim VII of his *habeas* request, petitioner asserts that he was denied due process, assistance of counsel, and the right to present evidence because the indictments against him were framed in a vague and inappropriate manner. In the first part of this claim, petitioner says that the indictments failed to inform him of what the Commonwealth intended to prove and on which alleged "transaction" it intended to make its case.

Long-established principle holds that an accused must be informed as to the charges against him so that he may prepare his defense and not be taken by surprise at trial. See Berger v. United States, 295 U.S. 78, 82 (1935). In addition, an indictment must provide adequate notice of the charges against the defendant so that he may be protected against another prosecution for the same offense. Id. It is also well-established, however, that an indictment is sufficient if it sets forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611, 612 (1881). "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124 U.S. 483, 487 (1888). See also United States v. American Waste Fiber Co., 809

F.2d 1044, 1046 (4th Cir. 1987) (indictment must alert defendant and counsel to all necessary elements of offense charged and be sufficiently detailed to be pled in another prosecution to avoid double jeopardy).

Buchanan protests that the capital murder indictments against him were constitutionally insufficient to provide him notice of the charges against him. Petitioner was eventually tried on three separate capital murder indictments. The first indictment (No. 5784) charged petitioner with violating the capital murder statute through the premeditated killing of Buchanan, Sr. "as a part of the same act or transaction of" the premeditated killing of "one or more other persons, to-wit: Joel Jerry Buchanan, Christopher Donald Buchanan, or Geraldine Patterson Buchanan." The second capital murder indictment (No. 5947) included two counts -- count one charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Christopher Donald Buchanan; and count two charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Geraldine Buchanan. The third capital murder indictment (No. 5948) also contained two counts -- count one alleges that petitioner murdered, in the same transaction, Christopher Donald Buchanan and Joel Jerry Buchanan; and count two alleges that petitioner murdered, in the same transaction, Joel Jerry Buchanan and Geraldine Patterson Buchanan.

Buchanan argues that, because of the manner in which the indictments were framed, he was not sufficiently notified of the charges against which he was asked to defend. Specifically, the defendant asserts that he was not properly notified as to which "transaction" the Commonwealth intended to prove.

As the Virginia Supreme Court pointed out during petitioner's direct appeal, however, the Commonwealth is entitled to charge the commission of a single offense in several different ways in order to meet the contingencies of proof. Buchanan, 384 S.E.2d at 762 (citing Bryant v. Commonwealth, 53 S.E.2d 54, 56 (Va. 1949) and R. Bacigal, Virginia Criminal Procedure § 13-6 (1983)). In this case, because Buchanan could theoretically have been convicted on two counts of capital murder, each involving two different victims, the Commonwealth was justified in outlining the different possible permutations of "transaction" under which petitioner might have been found guilty. The indictments themselves are adequately clear as to which transactions the Commonwealth was entitled to try to prove. Buchanan was given sufficient notice that he was defending against all of the possible "transactions" described in the indictments. In other words, the indictments alerted petitioner to the fact that the Government had several alternative theories under which it was seeking a capital murder conviction. One theory (shown by indictments no. 5784 and no. 5947) was that petitioner murdered Buchanan, Sr. and one or more of the other victims in the same transaction. This theory encompasses all transactions which involve the killing of Buchanan, Sr. The second theory (contained in count one of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Christopher Donald Buchanan in the same transaction. And another theory (from count two of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Geraldine Buchanan in the same transaction. The court is of the opinion that the indictments very clearly state the different possible transactions, and that the Commonwealth is entitled to pursue alternative theories in a criminal trial. Buchanan was not denied due process, effective

assistance of counsel, or the right to present evidence simply because he was forced to defend against alternate charges.

Claim VIIB: The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the numb[illegible] of indictments.

The second part of petitioner's claim concerning the multiple capital murder indictments against him is that the trial court unconstitutionally limited his defense counsel's opening statement by refusing to allow any discussion of the number of the indictments in the case. Buchanan asserts that this restriction resulted in a denial of due process, the effective assistance of counsel, and the right to present evidence.

The court is of the opinion that this argument is also without merit. Petitioner did not have a constitutional right to give an opening statement, and a trial court has the authority to place restrictions upon subjects to be commented on during opening statements. See, e.g. United States v. Odone, 888 F.2d 1014 (4th Cir. 1989) (trial judge attempted to set forth ground rules for opening statements; when one defendant failed to comply, court had the discretion to sever the trial of that defendant); United States v. West, 877 F.2d 281 (4th Cir. 1989) (trial court justified in stripping defendant of *pro se* status when he did not follow restrictions placed upon his opening statement); Arnold v. Eastern AirLines, 681 F.2d 186 (4th Cir. 1982) (trial court justified in prohibiting comments about the defendant's settlement practices); United States v. Pinkerman, 374 F.2d 988 (4th Cir. 1967) (trial court prohibited government from mentioning defendant's incriminating statements during opening remarks).

It is not the function of the opening statement "to apprise the accused of every aspect of the charges against him -- that is done by the indictment." Butler v. United States, 191 F.2d

433, 435 (4th Cir. 1950). By the same token, the opening statements of counsel are not intended to inform the jury as to the specific elements of the crimes involved. Rather, opening statements are intended to give the jury an objective summary of the evidence that each side expects to produce. United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986). At the close of the evidence, it is the function of the trial court to give instructions on the specific findings that the jury must make in order to convict the defendant of a particular charge. The court finds that the restrictions the trial court placed upon the parties' opening statements in this case were within its discretion and did not affect the constitutional rights of petitioner.

Claim VIII: The trial court unconstitutionally denied Buchanan's motion for change of venue.

Part A of Claim VIII, concerning general pretrial publicity, was first raised by petitioner in his motion for change of venue; the claim was properly exhausted when raised on direct appeal and was not procedurally defaulted. However, Part B of Claim VIII is procedurally barred because the issue of false information in the pretrial publicity was not mentioned in Buchanan's motions at trial for change of venue or raised in his direct appeal. The Virginia Supreme Court noted on direct appeal that Buchanan had not complained of false publicity as a grounds for his venue motion; then, in state *habeas*, the Supreme Court found the venue change claim barred under the rule of Slayton to the extent that it raised a matter not asserted on direct appeal. Ineffective assistance of counsel cannot serve as cause for this default, as no allegations concerning counsel's ineffectiveness were raised in the state *habeas*

courts to excuse the Slayton default and as Buchanan has not offered any explanation for this omission. Justus, 897 F.2d at 713.

; Likewise, the court is barred under Keeney from considering any evidence concerning false information in pretrial publicity as supporting evidence for Part A of the claim, as petitioner argues. 504 U.S. at 8. Simply presenting evidence of the publicity to the state courts was not the equivalent of proving information in that publicity to be patently false and, therefore, prejudicial. Buchanan has not offered any reason for his failure to develop the false information evidence in the trial motions or in the direct appeal; the very fact that the Virginia Supreme Court noted this failure in making its decision on direct appeal suggests that the decision on appeal might have been different if the trial court had been faced with clearly false information in pretrial publicity. This situation is an excellent example of the reasoning behind application of default rules to development of supporting evidence in state court proceedings. If the state courts are not presented with a fair representation of petitioner's claims and all the relevant proof of those claims, they are not being presented with a fair opportunity to correct their own constitutional errors. Because Buchanan failed to develop his false information evidence before the state trial and appellate courts, this court is barred from considering Claim VIIIB, either as a separate claim or as additional information in support of Claim VIIIA. Id. and Coleman 501 U.S. at 750.

In Claim VIIIA, Buchanan essentially claims that the court denied him his Sixth Amendment right to an impartial jury because the trial judge refused to grant his motion for a change of venue based on general, pretrial publicity. Buchanan avers that potential jurors in Amherst County had been so inundated by local pretrial publicity, which would prejudice them

against him from the start, that the only way for him to receive a fair trial was for the court to grant the venue change.

; Where pretrial publicity raises a possibility of jury bias, the court has a constitutional duty to explore through adequate *voir dire* the impact, if any, which such publicity has had on jurors' ability to be impartial. See Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987). The trial court need not question venire persons on the content of publicity to which they were exposed so long as *voir dire* is adequate to determine if prospective jurors could remain impartial despite pretrial publicity and decide the case only upon the evidence presented to them during trial. Mu'Min v. Virginia, 500 U.S. 415, 427 (1991). A reviewing court should not easily second guess the trial court's *voir dire* because it is the trial judge who must reach factual conclusions regarding impartiality and credibility by relying on demeanor evidence and responses to questions. Rosales-Lopez v. United States, 451 U.S. 182, 188-90 (1981). A trial judge's decision not to change venue, because he believes an impartial jury can be seated, will only be overturned by a reviewing court for "manifest error." Irvin v. Dowd, 366 U.S. 717, 723 (1961) (emphasis added).

There is no evidence provided by petitioner in either the initial petition or any of the papers filed in opposition to the respondent's motion which even hints at a violation of petitioner's right to an impartial jury. Though the trial court acknowledged that there had been some publication of the facts surrounding the murders and the trial of Buchanan's wife, Christianne, Buchanan's prospective jury members, when questioned during *voir dire*, did not exhibit the sort of partiality and pretrial publicity knowledge which would have necessitated a

change of venue or which would lead a reviewing court to find that the jury had been tainted. See Patton v. Yount, 467 U.S. 1025, 1026 (1984).

Unlike Shepard v. Maxwell, 384 U.S. 333, 347 (1966), in which the judge refused to question the venire persons about the effect of media publicity, in Buchanan's case the judge was very careful to ask prospective jurors if they were aware of the case and if they could put aside what they had heard from any other source and decide the matter based solely on the evidence presented at trial. Only two jurors, Donald Hendrick and Albert Hartberger, exhibited an inability to put aside what they had heard about the trial, and they were dismissed for cause by the court. (Trial Tr. 41-45, 154-163). Other jurors evidenced only minimal to moderate knowledge about the events surrounding the trial, and, to a person, they all said they could put what they had previously heard behind them.[18]

Buchanan points to one lone article detailing his wife's conviction as his proof that venue should have been changed. That showing does not rise to the level at which this court would find that the trial judge abused his discretion when he did not grant the change of venue motion. The evidence shows quite the opposite, in fact, and this court finds that "[s]electing the jury was relatively easy, . . . the publicity was accurate and noninflammatory, and . . .

[18]Of the twelve jurors and two alternates actually seated, Jerry Baker (Tr. 45-63), Strother Snead (Tr. 172), Thomas Cheryba (Tr. 321-22), George Speidell (Tr. 417), Joseph Liggon (Tr. 426), Mark Shrader (Tr. 577), and Linda Laughlin (Tr. 590), were moderately aware of the circumstances surrounding the murder and some were also cognizant that Christianne Buchanan had been convicted a few days earlier as an accomplice to the murder. The other members of the selected jury panel: Thomas Hardy (Tr. 193-94), Myra Ramsey (Tr. 277), Juanita Roberson (Tr. 308-09), Audrey Hudnall (Tr. 438), John L. Smith (Tr. 463-64), Diane Young (Tr. 500), and Margaret Cash (509-10), only exhibited minimal knowledge of the murders and Christianne's trial. Similar patterns can also be seen with the jurors stricken for cause by the court (most of whom were dismissed because of an inability to impose the death penalty) as well as among those who were removed through the use of challenges used by the trial counsel.

there was no indication [among the venire persons] of 'widespread prejudice.'" Buchanan, 384 S.E.2d at 768. Petitioner is not entitled to relief on this claim.

Claim IXA: The trial court refused to let defense counsel ask jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

Buchanan argues that the trial court denied him due process by erroneously refusing to allow Buchanan's counsel to ask prospective jurors, "Do you believe that a death sentence is the only appropriate punishment for capital murder?" This claim is without merit. Buchanan relies upon Morgan v. Illinois, which held that a defendant must be allowed to inquire whether a juror would "automatically vote for the death penalty in every case." 504 U.S. 719, 729 (1992). However, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. Mu'Min, 500 U.S. at 424-26. The trial court told Buchanan's counsel, "I don't object to you asking in a different way about whether [the juror] would automatically give the death penalty," and the trial court directly asked the prospective jurors if they could consider voting for a sentence less than death. (Tr. at 234, 253).

Buchanan's counsel agreed that the trial court had asked the questions required by law. (Tr. at 253). The trial court explained that the reason for disallowing the proposed line of inquiry was the question's argumentative nature. (Tr. at 247-255). The trial judge also objected to proposed questions regarding the "appropriate punishment" for capital murder without explanation of the punishments legally available for capital murder. The trial court explained, "[t]he jury is not considered to be a group of lawyers who know all the legal answers." (Tr. at 291-2). The trial court allowed Buchanan's counsel to ask clear, re-phrased Morgan-type questions of prospective jurors, as demonstrated in the following examples:

To Mrs. Rhodes:
"Do you understand that if the defendant is convicted of capital murder that the death penalty is not automatic in those cases? . . . Do you have any religious or personal or ethical beliefs that would require you to vote for the death penalty and not consider life imprisonment?"

To Mr. Cheryba:
[I]f Douglas McArthur Buchanan, Jr.--that's him, Doug here--is convicted of capital murder, would you feel incumbent to impose the death penalty or would you follow the law and consider each of the criteria as instructed by the court . . . and make up your mind based on the evidence and the law?

To Mrs. Giles:
Do you understand that the death penalty--even if he is convicted of capital murder, the death penalty is not automatic? . . . You understand that the jury has to listen to all of the evidence, both in his favor and against him, and then decide whether . . . death is the appropriate punishment or life imprisonment is the appropriate punishment? . . . [Y]ou would be willing to consider life imprisonment if you felt like the facts merited that?

The court allowed counsel to ask Mr. Lewandoski the following questions:

Do you believe if you heard this case and decided, based on the evidence, to impose a life sentence rather than the death penalty that you would be under any pressure from--or that you would catch any hard--ill feelings from the people at work . . . Do you feel like you can consider everything--every factor that comes into evidence in this case and fairly consider the possibility of a life sentence with that pressure in the background [from people at work who felt the only choice for Buchanan's punishment was the death penalty]?"

When Mr. Lewandowski said no to the second question, the court followed up with questions of its own: "What you're saying is that you feel--you would feel an undue amount of pressure from people who would see you after the case was over if you had voted for some punishment that they didn't approve of? . . .So would that affect your decision in the cases, do you think? Do you have some reasonable doubt about it in your mind?" Mr. Lewandowski answered, "Yeah, I think I do. Yes." The court dismissed him from the case immediately. See Tr. at 267, 335, 349-350, 371-374.

As these examples make clear, the trial court met the constitutional requirements set out in Morgan, 504 U.S. at 729. The Virginia Supreme Court ruled on direct appeal that the trial court had correctly refused the tendered question. Buchanan, 384 S.E.2d at 765. The trial court afforded ample opportunity for counsel to ask relevant questions, and the questions actually allowed and asked by the trial court were sufficient to preserve Buchanan's right to a trial by a fair and impartial jury. U.S. Const., amend. VI and XIV.

Claim IXB: The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

As stated above, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. Mu'min, 500 U.S. at 424-26. A defendant is constitutionally entitled only to know whether a juror can remain impartial in light of information that juror has previously obtained, not to explore the specific content of the acquired information. Id. at 431. "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." Irvin, 366 U.S. at 722. The material inquiry in *voir dire* is not whether jurors know details about the case, or even that they have some impressions about what may have happened, based on what they have read or heard. The material inquiry is whether the jurors have "such fixed opinions that they could not judge impartially the guilt of the defendant." Patton, 467 U.S. at 1035.

Not long into the *voir dire* process, Buchanan's counsel asked Juror Hartberger, "No what impressions do you have about Douglas' involvement in the case from what you've read? . . . You believe he did it from what you read?" Mr. Hartberger answered, "from what I read, I'd have to say yes. . . . [T]he newspapers, the television and everything has kind of

impressed upon me that there's no doubt he's guilty." The court questioned Mr. Hartberger further about whether he could put aside what he had read and judge the case only upon the evidence presented to him at trial. Mr. Hartberger said that he thought he could. He said, "I've never said that he's guilty. I said if I believed what the newspaper said, then I would assume that he was guilty." The court dismissed this juror for cause, but admonished Buchanan's attorneys not to ask jurors about their impressions of the case or to pose hypothetical questions about what jurors believed about the case based on newspaper reports. Buchanan claims these limitations prevented him from determining whether or not jurors retained the ability to be impartial. He further alleges that the questions asked and allowed by the court suggested the answers jurors should give if they wanted to serve on the jury. (See Tr. 153-68)

The court finds no merit to this claim. While the trial court's questions to jurors about pretrial publicity were, for the most part, answerable with a yes or a no, they are precisely the sort of *voir dire* questions which were found constitutionally adequate in Mu'min to evaluate juror impartiality.[19] 500 U.S. at 420. From the court's questions, counsel discovered the

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[19]The court in Mu'min asked the following questions:
Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case? . . . In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, [do you believe] that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

The court in Buchanan's case asked Mr. Hartberger the following questions:
Now have you read about these cases in the newspaper? . . . And have you heard and seen about them on television? . . . [H]ave you heard anything on the radio? . . . Have you heard the case discussed by other people not in the news media?

After Mr. Hartberger answered in the affirmative to all of these questions, the court asked:
Now, will such information as you have received from those sources affect your impartiality in this case? . . . Can you try the case based solely on the law and the evidence you hear in court? . . . And not be affected

specific news media to which each juror had been exposed, if not the specific content of each article or news report he had seen or specific impressions he had gained from them. The court asked numerous questions, from different angles, about the affect, if any, which exposure to pretrial publicity might have on the juror's ability to decide the case on the evidence presented at trial. The court rephrased each question at least once to be sure the juror understood him and that he understood the juror's response.

After a thorough review of the transcript, this court agrees with the Virginia Supreme Court's assessment of *voir dire* in Buchanan's case:

> The trial court's questions were not leading, but were proper, fair, and evenhanded. Moreover, it appears that Buchanan's so-called open ended nonleading questions were nothing more than efforts to engage prospective jurors in rambling, unspecific, unfocused dialogues far removed from the core concern of *voir dire*, which is to determine whether jurors stand indifferent in the cause."

384 S.E.2d at 765 n.2. See also Mu'min, at 420. The trial court did not commit constitutional error in disallowing the tendered questions or in conducting *voir dire*. This claim must be dismissed as meritless.

Claim IXC: The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

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or influenced in any way by what you previously heard or read or seen about the case? . . . Have you yourself expressed or formed any opinion as to the guilt or innocence of the accused? . . . Considering what you have heard or read or seen on television about the case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching any fixed opinion or conclusion as to the guilt or innocence of the accused? . . . Do you have any doubt in your mind? . . . You can try the case based on what you hear in court? . . . Do you know of any bias or prejudice either against the Commonwealth or the accused that you might have? . . . Do you know now of any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused based solely upon the law and the evidence in the case?

Buchanan admits that his Witherspoon claim was defaulted at trial. The trial court dismissed five jurors for cause, based upon their express opposition to the death penalty in response to the court's *voir dire* questions. Counsel failed to object to any of these dismissals or to request an opportunity to rehabilitate them. Although Buchanan raised the claim on direct appeal, the Virginia Supreme Court found it barred under Rule 5:25 of the Virginia Supreme Court Rules, based on counsel's failure to rehabilitate, or otherwise object, at trial.[20] Petitioner did argue in his state *habeas* petition that counsel was ineffective during *voir dire* in making and preserving objections to specific actions by the court. Even assuming that this vague reference is sufficient to constitute exhaustion of a claim that counsel were ineffective in their handling of Witherspoon jurors, in order to show cause and prejudice for his default, petitioner must first prevail on the ineffectiveness claim itself, by demonstrating incompetence and resulting prejudice as defined in Strickland v. Washington. Murray v. Carrier, 477 U.S. at 487-89. As the court finds no evidence that any of the five Witherspoon jurors could have been rehabilitated, it is the opinion of the court that counsel were not incompetent when they did not seek to rehabilitate those jurors.

Under Witherspoon as slightly modified in later cases, a capital juror may be dismissed for cause only if the "juror's views would 'prevent or substantially impair the performance of his duties as a juror." Wainwright v. Witt, 469 U.S. 412, 424 (1985)(modifying Witherspoon test). This determination regarding a juror's views need not be made with "unmistakable clarity"; it is sufficient if the trial judge is "left with the definite impression that a prospective

[20]Rule 5:25 states in relevant part:
Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling.

juror would be unable to faithfully and impartially apply the law." Id. at 426. Neither Witherspoon nor Witt indicate that the trial judge must withhold his determination about a death-opposed juror until after defense counsel has had opportunity to attempt rehabilitation of that juror. Accordingly, the court is somewhat confused by the phrasing of petitioner's claim, but will assume that petitioner's primary concern is the alleged failure of the trial court adequately to explore the Witherspoon/Witt question, whether through additional questions from the court or through questions by defense counsel, in order to ensure Buchanan a fair trial.

As stated, the court finds no evidence that Buchanan was denied a fair trial because the trial court did not question the Witherspoon jurors further about their ability to impose the death penalty despite their views against it. Based on the jurors' answers to the trial court's questions, the court is satisfied that the trial court met all Witherspoon/Witt requirements before dismissing the jurors.[21] Petitioner does not here suggest any specific rehabilitation

[21]Following are relevant excerpts from the trial court's questioning of the five jurors in question.

The Court:	In cases involving capital punishment, do you have any opinion such as to prevent your convicting anyone of an offense punishable with death?
	. . . .
Mrs. Warrick:	No.
The Court:	Do you have such an opinion that you could never vote to impose the death penalty in a case? Ma'am?
Mrs. Warrick:	No.
The Court:	You could never vote to impose the death penalty?
Mrs. Warrick:	No.
The Court:	You could not?
Mrs. Warrick:	No.
The Court:	All right, you're excused . . . .
The Court:	Do you have an opinion such as to prevent your convicting anyone of an offense punishable with death?
Mr. Renalds:	Yes, sir.
The Court:	In other words, if the offense of capital murder under Virginia law is punished with either death or life, if he's convicted of that offense, either a life sentence or death–so you have such an opinion of the death penalty that you would not convict someone of that offense

questions which should have been asked of the jurors before dismissal, and the court can think of none which would not have been redundant or futile; Witherspoon does not require the court to badger potential jurors into questioning their firm beliefs against capital punishment. Counsel could reasonably have believed that these jurors could not be rehabilitated, based on their strongly expressed views in opposition to the death penalty. Accordingly, the court finds that Buchanan has failed to demonstrate that his attorneys were incompetent in failing to object to the court's dismissal of the jurors or to seek to ask their own rehabilitation questions. Where a petitioner fails to demonstrate incompetence, the court need not inquire into the prejudice prong of the Strickland standard; petitioner's ineffectiveness claim fails. 466 U.S. at

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	which may be punishable with death? Is that what you say?
Mr. Renalds:	I believe so, sir.
The Court:	All right. You're excused . . . .
The Court:	First, in cases involving capital punishment, do you have any such opinion such as to prevent your convicting anyone of an offense punishable with death?
Mrs. Weigand:	I couldn't.
The Court:	So you couldn't convict anybody if the possibility was life or death?
Mrs. Weigand:	I could not convict anybody if the penalty was death.
The Court:	. . . . [Here, the court explained that capital murder cases are decided in two phases, a guilt phase and a sentencing phase where the two sentencing choices are life or death] And the question I'm asking you on the guilt part of it or innocence part of it, could you vote for convicting a person of capital murder knowing that when you got to the penalty phase the penalty would either be life or death?
Mrs. Weigand:	No.
The Court:	So you could not convict anyone in a case like that? All right you're excused. . . .
The Court:	Now do you have any opinion such as would prevent your—you from convicting anyone of an offense punishable with death?
Ms. Taylor:	I don't think I could do that.
The Court:	you could not even—you could not convict somebody to begin with of such an offense even though the offense were punishable with life or death?
Ms. Taylor:	I don't think I could, no.
The Court:	So where the death penalty was one possibility and life sentence was the only other possibility, you don't think you could convict a person of such a crime?
Ms. Taylor:	No, sir.
The Court:	Anyone have any further questions on that point? All right, you're excused, Ms. Taylor.

697. Accordingly, the court finds the Witherspoon claim to be procedurally defaulted and, therefore, barred from further federal review. Harris, 489 U.S. at 262.

Claim XA. The trial court failed to sequester the jury.

As with Claim IV, Buchanan raised Claim XA on direct appeal as a matter of state law, but did not allege that the court's omission also violated the United States Constitution or cite any federal case law. On direct appeal, the Virginia Supreme Court treated the claim as one raised under state law and found it meritless. Then, when petitioner raised the claim in state *habeas*, the Virginia Supreme Court found the federal constitutional claim concerning sequestration to be barred, pursuant to Slayton. 205 S.E.2d at 682. Under the same analysis as detailed under Claim IV above, the court finds federal review of this claim to be barred by petitioner's procedural default on direct appeal. Harless, 459 U.S. at 6-7.

Again, petitioner argues that the court should address the merits of his claim, since the state and federal claims regarding sequestration of the jury are practically identical. Even assuming that Virginia law and federal constitutional law on this issue are similar and that the claim is somehow preserved for federal *habeas* review, the court finds petitioner's claim meritless. Criminal defendants have no constitutional right to a sequestered jury, but they do have the right to a fair trial. In cases where publicity surrounding a criminal trial is pervasive and prejudicial, the court has inherent power and even a duty to minimize the effects of the publicity on the fairness of the trial through such measures as sequestration of the jury. See Sheppard, 384 U.S. at 357-59. In the Sheppard case, the United States Supreme Court found the extent of publicity, both before and during trial, was so extreme and so pervaded the trial process that the defendant was denied his constitutional right to a fair trial. The Court

specifically found that under the unique media blitz that had surrounded Sheppard's trial, the trial judge should have sequestered the jury on his own motion. Id. at 351. To succeed on his sequestration claim, however, Buchanan must show that failure to sequester the jury so affected the fundamental fairness of his trial as to violate due process. Bowman v. Bordenkircher, 522 F.2d 209, 210-11 (4th Cir. 1975). The court finds that he has not met this burden.

First, he has not presented evidence indicating that the extent of the publicity in his case reached nearly the proportions of the media interference in the Sheppard case or the other cases therein cited in which courts presumed prejudice from media coverage. In Sheppard's case, the media publicized the names and addresses of prospective jurors and, as a result, venire persons received anonymous letters and telephone calls, along with calls from acquaintances, about the upcoming trial. Sheppard, 384 U.S. at 342. Before trial, news reports emphasized evidence against Sheppard, pointed out discrepancies in his statements to police, and reported supposed "facts" about him and the case which were never brought out in trial testimony or evidence. One radio station was allowed to set up broadcasting facilities in the room where jurors rested during court recesses and deliberated. Id. at 343. Newscasts originated from this room throughout the trial and during jury deliberations. Outside the courthouse, television and other cameras snapped pictures of the jury and judge; one broadcast included an interview with the judge as he came into the courthouse. Jurors were also photographed during *voir dire* and during trial. Newspapers had access to the daily record of trial proceedings and witness testimony was printed verbatim in local papers, along with objections and judicial rulings. Pictures of jurors appeared more than 40 times in local papers.

On the contrary, Buchanan has not presented to this court any direct evidence of the extent of the media coverage of his trial. In the record, the court found a photocopied article about the killings and Christianne's upcoming trial and a front page newspaper article published after her conviction for first degree murder before the same judge who would later preside over Buchanan's trial; the judge is quoted in the second article as stating that he had no doubt about Christianne's guilt on the first degree murder charges. The second article appeared four days before Buchanan's trial began.[22] Buchanan also asserts that there was daily coverage of the trial in the media, although he presents absolutely no evidence of such coverage or its specific contents.

Any capital murder case is bound to engender media coverage, but to prevail in his sequestration claim, Buchanan must present evidence that the coverage affected the fairness of proceedings. Buchanan does not suggest that members of the media interfered with the jurors directly, as they did in Sheppard's case. Nor does he demonstrate that any of information about the killings, which was presented by the media before and during his trial, was not also presented to the jury during trial proceedings.[23] Sequestration would not have prevented the influence the pretrial articles about the case or his wife's trial may have had on potential jurors.[24]

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[22]The court notes that because Christianne Buchanan's trial was not a jury trial, she could only have been convicted if the judge felt she was guilty beyond a reasonable doubt, as the judge rendered the verdict.

[23]As indicated above, Claim VIIIA, petitioner does claim that false information about a possible financial motive behind the killings did appear in media reports. However, the court cannot consider that allegation in review of this claim or any other claim as petitioner failed to present it to the state courts.

[24]The trial court addressed the influence of this and other pretrial publicity during *voir dire*, as discussed above in the analysis of Claim VIII concerning the court's failure to grant a change of venue based on pretrial publicity.

Furthermore, the trial court took steps to ensure that the jury remained impartial. *Voir dire* has been discussed at length above. At the end of court each day of Buchanan's trial, the trial judge admonished jurors to avoid media coverage and conversations with others about the trial. He also emphasized to the jurors that they must decide the case based only upon the evidence presented to them in the trial proceedings. On direct appeal, Buchanan asserted that "[t]here [was] no way for the court to know who the jurors talked to or what papers they read during the six days of the trial." The court finds no indication that jurors disobeyed the judge's daily admonitions concerning media coverage or that they were exposed to any prejudicial media coverage during the trial itself. Finding that petitioner has not presented any genuine issue of material fact concerning his claim that failure to sequester the jury resulted in a fundamentally unfair trial, it is the opinion of the court that no evidentiary hearing on this matter is warranted and that the claim must be dismissed as meritless.

Claim XB: The trial court failed to grant additional peremptory challenges during jury selection.

Respondent does not argue that this claim is defaulted, although petitioner failed to pose this claim specifically as a federal constitutional claim on direct appeal. Buchanan does, however, cite Gray v. Mississippi, 481 U.S. 648, 663 (1987), a United States Supreme Court case which addresses a constitutional claim involving, at least indirectly, additional preemptory challenges in a death penalty case. Citation of this case may be said to "fairly apprise" the Virginia Supreme Court that Buchanan was attempting to raise the claim under both Virginia law and constitutional law; therefore, the court finds this claim to be exhausted and not defaulted under Harless. 459 U.S. at 6-7. See also, Renzi v. Commonwealth, 794 F.2d 155,

158 (4th Cir. 1986)(designation of due process claim and citation of federal case sufficient to satisfy §2254 exhaustion and meet Harless test).

Although Gray v. Mississippi does provide reference to a constitutional claim regarding additional peremptory challenges in a death penalty case, the decision is profoundly unhelpful to Buchanan. The Court in Gray did not find a constitutional right to additional peremptory challenges. 481 U.S. at 663. In fact, the Supreme Court found the trial court's exclusion of the venire person in Gray to be reversible error. Id. Peremptory challenges are not required by the Constitution. Ross v. Oklahoma 487 U.S. 81, 88 (1988). The Court in Ross stated that peremptory challenges should, therefore, be treated similarly to other potentially state-created rights; thus, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law requires." 487 U.S. at 89.

The Virginia Supreme Court has declared that "[t]here is no basis in Virginia law for additional peremptory strikes." Buchanan, 384 S.E.2d at 767; See also O'Dell v. Commonwealth 364 S.E.2d 491, 501 (Va. 1988). The trial court did not err in failing to grant additional peremptory challenges to Buchanan. Although Buchanan may have fairly apprised lower courts of a federal constitutional question concerning peremptory challenges, that question is easily answered: there is no separate federal right to peremptory challenges and Buchanan "received that which state law require[d]," in satisfaction of federal due process directives. Ross, 487 U.S. at 89.

Claim XI: Imposition of the death penalty constitutes cruel and unusual punishment.

This claim raising a general constitutional challenge to any imposition of the death penalty was not presented to the state courts in petitioner's previous proceedings, and it is,

thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. See Teague, 489 U.S. at 298; Bassette, 915 F.2d at 935-37.

Claim XIIA: Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on grounds of double jeopardy.

Petitioner asserts that his trial counsel was ineffective for failing to advise him to plead guilty to four indictments charging him with first degree murder.[25] Petitioner argues that under Virginia law he had an absolute right to plead guilty to the whole of any of the indictments against him. If Buchanan had entered a guilty plea to the indictments charging him with first degree murder, he believes, double jeopardy would have prevented the Commonwealth from prosecuting him on the capital charges. The Commonwealth responds that petitioner's understanding of the double jeopardy implications of a guilty plea is faulty in this case, where the indictments on first degree murder and those on capital murder were tried in a single proceeding. Although the court recognizes that the merits of petitioner's double jeopardy argument in the plea context are unclear under current Virginia law, it is of the

[25]A total of fourteen separate indictments were returned against Buchanan. The first four alleged capital murder for killing Buchanan, Sr. and one or more of the other victims in a single transaction. Three of these indictments were later quashed as being redundant of the first. The grand jury then returned two capital murder indictments, each containing two counts which described different possible double murder transactions. Four other indictments charged petitioner with the use of a firearm in the commission of a murder. Finally, four first-degree murder indictments were returned for the individual murders of each of the victims. Petitioner was initially arraigned on the original four capital murder indictments and the four firearms indictments. He was rearraigned just before trial on three capital murder indictments, four firearms indictments, and four first-degree indictments. Petitioner now asserts that he should have been advised to plead guilty to the four first-degree murder indictments and that by doing so, the Commonwealth would have been barred, on double jeopardy grounds, from prosecuting the capital murder indictments.

opinion that counsel were not ineffective for failing to raise this issue or in failing to advise Buchanan to plead guilty at the time this case was tried.

At the outset, it is important to note the standards governing an ineffective assistance of counsel claim. The sixth amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court adopted a two-prong test for determining whether a defendant was denied effective assistance. The first prong is incompetence. Petitioner must show that counsel's representation fell below an objective standard of reasonableness. Id. at 688. A strong presumption exists that the defendant's counsel acted within his professional discretion and provided reasonable service. A reviewing court will be highly deferential in scrutinizing the performance of counsel. Id. at 688-89; Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991), cert. denied, -- U.S. -- (1992)(best course for *habeas* court is to credit trial counsel's plausible strategic choices).

The second prong of the Strickland test is prejudice. The *habeas* petitioner must be able to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694; see Hutchins v. Garrison, 724 F.2d 1425, 1431 (4th Cir. 1983) (burden on petitioner to show prejudice), cert. denied, 464 U.S. 1065 (1984); Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977) (incorrect advice or trial error must be prejudicial).

In this case, determining whether Buchanan was prejudiced by counsel's actions requires an examination of the underlying merits of petitioner's double jeopardy argument. In

support of his position, petitioner first points to the case of Graham v. Commonwealth, 397 S.E.2d 270, 271 (Va.App. 1990), in which the Virginia Court of Appeals held that the Virginia Constitution and laws give a criminal defendant the absolute right to plead guilty to the whole of any indictment against him. The court may reject such a guilty plea only if it believes that the plea was not made intelligently, voluntarily, and knowingly, in accordance with federal Constitutional requirements. Id. at 273.[26] Petitioner next relies upon several Virginia state and federal cases which hold that a guilty plea is the equivalent of a conviction. See Kercheval v. United States, 274 U.S. 220, 223 (1927) (guilty plea is a conviction, and like a jury verdict, is conclusive); Knight v. Johnson, 529 F.Supp. 1309, 1322 (E.D.Va. 1982) (court should not have required defendant to go through full trial after accepting guilty plea), rev'd 699 F.2d 162 (4th Cir. 1983) (court entitled to hear all evidence necessary to understand the case and affix an appropriate sentence), cert. denied 464 U.S. 832 (1983); Hancock v. Slayton, 341 F.Supp. 436, 439 (W.D.Va. 1972) (because guilty plea is a self-imposed conviction, defendant usually cannot appeal unless it appears the plea was coerced); Miracle v. Peyton, 176 S.E.2d 339, 341 (Va. 1970) (a voluntary plea of guilty is a conviction and nothing is left but the imposition of the prescribed punishment). Finally, Buchanan notes that the double jeopardy clause embodies three guarantees, including protection against a second prosecution for the same offense after a conviction. See North Carolina v. Pearce, 395

[26]In Graham, the defendant was charged in a single indictment and initially entered a plea of not guilty. After the Commonwealth had presented its evidence at trial, however, the defendant informed the court that he wished to change his plea to guilty. The court refused to accept the plea, saying that the defendant's offer came too late. 397 S.E.2d at 272. The Court of Appeals reversed, noting that while the United States Constitution did not provide a defendant with the absolute right to plead guilty, the Virginia Constitution and Virginia Code § 19.2-254 did grant defendants that right. Id.

U.S. 711, 717 (1969). Based on these principles, he argues that had he pled guilty to the first degree murder indictments, the trial court would have been required to accept his plea, and that conviction would have precluded the Commonwealth from prosecuting the capital murder indictments on double jeopardy grounds.

The Commonwealth responds that Buchanan's understanding of double jeopardy in this situation is erroneous, and asserts that the United States Supreme Court's decision in Ohio v. Johnson, 467 U.S. 493 (1984), is controlling. In that case, the defendant attempted to plead guilty to several counts of a single indictment. The trial court accepted the guilty pleas to counts that were lesser included offenses of other crimes charged in the indictment, and then granted the defendant's motion to dismiss the remaining charges, reasoning that prosecution of those charges would be barred by double jeopardy. The Supreme Court reversed, stating that the double jeopardy clause was not implicated by continuing prosecution of the charges remaining in the indictment. The Court explained that the defendant had not yet been exposed to conviction on the charges to which he had pled not guilty, and the state had not had the opportunity to marshal its evidence or resources more than once. Id. at 501. In conclusion, the Court stated: "[n]otwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the state from completing its prosecution on the remaining charges." Id. at 502.

The Commonwealth also points to the decision of the Virginia Court of Appeals in Rea v. Commonwealth, 421 S.E.2d 464 (Va.App. 1992). The procedural facts of that case are remarkably similar to the case at hand. The defendant in Rea was charged in multiple indictments of first degree murder and capital murder. When arraigned on all of the charges,

the defendant pled guilty to three first-degree murder indictments, and not guilty to the remaining charges, including three counts of capital murder. Id. at 466. The court found the guilty pleas to be proper, but decided to defer consideration of the pleas and submit the remaining charges to the jury. Id. The jury convicted the defendant of three capital murders, and the trial judge then convicted the defendant, based on his guilty pleas, of three first degree murders.[27] Id. The defendant was sentenced to imprisonment for nine life terms plus forty-seven years. On appeal, the court held that double jeopardy protected the defendant from multiple punishments for the same crime and vacated the three first degree convictions and sentences. Id. at 468. The defendant also argued on appeal that the court erred by withholding judgment on the guilty pleas, because acceptance of those pleas would have barred the Commonwealth from prosecuting the capital murder charges. Id. at 467. The Court of Appeals rejected this contention, however, noting that the defendant had been arraigned on all of the indictments on the same day: "By electing to plead guilty to three charges and not guilty to the remainder, defendant neither 'transformed the single prosecution into two separate prosecutions nor captured for himself any special protections against successive prosecutions under the double jeopardy clause.'" Id. (citing Walker v. Commonwealth, 415 S.E.2d 446, 447 (Va.App. 1992)) (other citations omitted). The court concluded that the defendant's multiple convictions were obtained in a single trial and therefore were not barred by double

[27]In entering the first degree murder convictions based upon the defendant's guilty pleas, the trial court noted that "there were only three victims . . . and accordingly there can only . . . be three convictions of homicide. But . . . this is a case of first impression in . . . Virginia . . . and the Court believes that the matter should be resolved by the Appellate Court *as to the issue of whether his pleas of guilty to first degree murder . . . actually placed him in jeopardy of the capital murder convictions.* And, of course, the Appellate Court [may] vacate the convictions [it] finds . . . [in]appropriate." Rea, 421 S.E.2d at 466 n.1 (emphasis added).

jeopardy. Id. Where multiple convictions are obtained in a single proceeding, only the double jeopardy guarantee against multiple punishments is implicated. Brown v. Ohio, 432 U.S. 161, 165 (1977) (where consecutive sentences are imposed at a single criminal trial, the double jeopardy guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense); Turner v. Commonwealth, 273 S.E.2d 36, 46-47 (Va. 1980).

Assuming that Rea is currently the controlling state law for the facts of the case at hand,[28] Voir dire cannot legitimately argue that he was prejudiced by counsel's failure to suggest a guilty plea on the first-degree murder indictments. Rea, along with Ohio v. Johnson, suggests that even if petitioner had attempted to plead guilty to the first degree murder indictments, the court would have allowed the Commonwealth to prosecute the capital charges.

Perhaps more importantly, the court notes that neither the Graham nor Rea decision had been rendered at the time Buchanan was tried. The double jeopardy argument now raised by petitioner in his request for *habeas* relief had no foundation at the time his trial counsel were preparing his defense. Counsel could not have predicted whether the trial court would have accepted the reasoning later adopted in Graham, or followed the procedure approved in Rea. Indeed, as the Commonwealth points out, Ohio v. Johnson was the controlling case on this issue at the time of trial. Based on the principle articulated in that case, counsel could

[28]As the Rea court made no reference to its previous decision in Graham, it is unclear what force the Graham holding may have outside of the context of a single indictment. In Sullivan v. Commonwealth, 420 S.E.2d 724 (Va.App. 1992), on rehearing 433 S.E.2d 508 (Va.App. 1993), the defendant raised a double jeopardy argument similar to the one advocated here. The court did not reach a decision on the issue, however, as they were able to decide the case on other grounds.

legitimately have believed that a guilty plea by Buchanan would not prevent the Commonwealth from prosecuting the capital murder charges. According to objective measures of reasonableness, then, the court believes that it was not incompetent for petitioner's trial counsel to fail to anticipate an argument that may have been asserted following the rule announced in Graham. See Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) (case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law). Since the issue of prejudice is at best unclear, and because the court does not believe counsel acted improperly, Buchanan has failed to meet either prong of the Strickland test and is not entitled to relief on this claim.

Claim XIIB: Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no viable excuse for his default of state procedural rules for appeal and *habeas*, this court is also barred from review of the claim. Teague, 489 U.S. at 298; Bassette, 915 F.2d at 935-37.

Claim XIIC: Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

Buchanan believes that recusal was warranted because the same judge who sat on the bench for petitioner's trial also presided over the trial of petitioner's wife, Christianne Buchanan. Petitioner further claims that the trial judge was quoted in the local newspaper,

just days before petitioner's trial began, stating that the jury was justified in finding Christianne Buchanan guilty of first degree murder.

In order to prevail on an ineffective assistance of counsel claim Buchanan would have to show both that his counsel was ineffective and that some prejudice resulted from counsel's defective performance. Strickland, 466 U.S. at 687. A justified contention of actual prejudice is therefore, necessary to successfully make out an ineffective assistance of counsel claim. In his state *habeas* petition, petitioner claimed that prejudice attached to his trial because the judge seated jurors who were aware of the publicity and predisposed to reject petitioner's evidence that he was only guilty of second degree murder. That however, is not the assignment of prejudice that petitioner claims in his federal *habeas* petition. Now Buchanan asserts that the trial judge showed his own predisposition to disregard the evidence of second degree murder and prejudice resulted when the trial judge refused to give a second degree murder instruction to the jury.

Such inconsistencies between state and federal collateral appeal petitions lead to a factual default of petitioner's federal declaration of prejudice. See Keeney, 504 U.S. at 8. Though both the federal and state *habeas* petition ineffective assistance of counsel claims revolve around the trial judge's statement to the press following Christianne Buchanan's trial and an allegation that the statement somehow prejudiced Buchanan's attempt to argue second degree murder, the allegations of prejudice are quite different. The state petition pointed to the jury as the cause of the problem, and now petitioner raises concerns about the judge's own state of mind. Without any proper claim of prejudice, this claim raised by petitioner fails on its face.

However, even if the claim were not defaulted or if some part of it survived default, petitioner's allegations here would fail on their merits. First of all, as stated earlier, the facts surrounding the murders of Buchanan's father, step-mother, and half-brothers simply did not warrant a second degree murder instruction. Petitioner simply cannot avoid the fact that consideration of a second degree murder conviction was not warranted by either the judge or the jury. Further, by making a statement to the press regarding Christianne Buchanan's guilt the trial judge was not making any determination about petitioner's guilt and petitioner does not claim that the trial judge failed to instruct the jury about considering only evidence presented during his trial, nor does petitioner bring forth any evidence to show that the jury was actually tainted by the judge's pre-trial statement regarding Christianne Buchanan's guilt.

With regard to petitioner's claim that his trial was one warranting recusal in the first instance, the court notes that a judge is assumed not to confuse evidence in one trial before him with facts presented in another case. See Dove v. Peyton, 343 F.2d 210, 214 (4th Cir. 1965). If petitioner's contention held any weight, judicial recusal would be required in any set of cases in which multiple defendants were tried separately and such a far sweeping rule has never been adopted by any court. See id. In addition, matters of judicial bias arising from public interest in a case are largely matters of state legislative concern and generally do not rise to the level of federal constitutional proportions. Tumey v. Ohio, 273 U.S. 510, 523 (1927); see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).

If Buchanan had any basis for seeking his trial judge's recusal based on the facts presented, it would have arisen under Virginia statutory or case law. In Virginia, judicial recusal is almost always a matter of discretion. Justus v. Commonwealth, 283 S.E.2d 905, 908

(Va. 1981), cert. denied, 455 U.S. 983 (1982), and public attention to a case is not a sufficient reason to warrant judicial recusal even when public pressure seeking the death penalty is brought to bear on the judge. Royal v. Commonwealth, 458 S.E.2d 575, 580 (Va. 1995).

Petitioner cannot make out any claim here. The proper application of Keeney leaves him without a declaration of prejudice on which to base his ineffective assistance of counsel claim. However, even if petitioner were left with any sort of contention that the trial judge's statement to the press regarding Christianne Buchanan's conviction somehow, in and of itself, prejudiced his own trial, whether because of the judge's actions or the jury's, that claim is completely insupportable on the merits as set forth above.

Claim XIID: Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

Buchanan claims that as a result of counsel's acceptance of the jury, some jurors were "improperly seated" and that counsel's waiver prejudiced his appeal to the Virginia Supreme Court. This allegation is meritless. As direct support for his claim of improperly seated jurors, petitioner points to Juror Cecil Banton. However, this juror was not among the fourteen venire persons ultimately seated on the jury (Tr. 609),[29] and there is no indication in the record that he, or any person who actually became part of the seated jury, would automatically "vote for death if given a choice of punishments," as Buchanan alleges in his

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[29]Counsel for defense used a peremptory challenge to remove Juror Banton from the venire. Petitioner argues in his *habeas* pleadings that "it is prejudicial error [under Virginia law] for the trial court to force a defendant to use the peremptory strike afforded him . . . to exclude a venireman who is not free from exception." Justus v. Commonwealth, 266 S.E.2d 87, 90 (Va. 1980). Yet, Buchanan's present claim focuses on counsel's ineffectiveness in failing to make and preserve objections to the jurors in the first place, not upon the errors of the trial court. Thus, the court will not address the court's alleged error in regards to the use of a peremptory challenge to remove Mr. Banton.

petition. In fact, Mr. Banton, in response to questioning by the defense counsel, said "I would follow the court and make up my own mind." (Tr. 133). Further, James Jedelsky was the only juror who actually indicated he might "vote for death" in the fashion contended by Buchanan in his petition. Mr. Jedelsky was excused for cause by the trial judge because he exhibited a strong feeling in support of the death penalty and indicated he might inject his feelings about the escalating crime rate into petitioner's trial (Tr. 545-46). Thus, the court finds no indication that any seated jurors were unacceptable in the manner petitioner alleges and, accordingly, that counsel were not ineffective for stating, in the jurors' presence, that the jury was "acceptable." See Strickland, 466 U.S. at 689 (court will be deferential to performance of counsel in order to balance distorting effects of hindsight).

In addition, counsel's decision to state that jurors were acceptable to Buchanan was part of a tactical strategy. Counsel had contacted the National Association of Criminal Defense Lawyers and the Southern Poverty Law Center before Buchanan's trial to ask for advice about defending a capital murder trial. The materials these organizations provided to Buchanan's counsel included a recommendation that the defendant should participate in selection of jurors and that jurors to whom counsel had previously objected should be told directly that the defendant "accepts" them as jurors to try his case, in an effort to encourage jurors' commitment to a fair evaluation of the evidence. Petitioner argues that this strategy had no factual basis because the jurors themselves had not heard counsel's previous objections. The court finds the strategy to be a reasonable attempt to influence the jury toward fairness in Buchanan's case. In any event, the court cannot second-guess a reasonable strategic decision by counsel, see Stamper v. Muncie, 944 F.2d 170, 177-78 (4th Cir. 1991), especially where

the court finds no indication that Buchanan's right to an impartial jury was prejudiced in any way by counsel's statement. This claim must be dismissed as meritless.

Claim XIIE: Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

Counsel's statement allegedly made on April 26, 1988, the day the trial began, that Buchanan was guilty of either capital or first degree murder, does not make out an ineffective assistance of counsel claim. Buchanan asserts that counsel's statement before trial, which was quoted in the papers, could have prejudiced the non-sequestered jury and denied him a fair trial. Petitioner essentially argues that he was entitled to have the jury consider a second degree murder charge, see supra, and counsel's statement made on the eve of trial prejudiced the jury against making such a determination. There are two ways the alleged prejudice may have attached to petitioner's trial: 1) the jury may have decided the case based on the pre-trial statements of counsel, not the evidence presented during the case, or 2) counsel's statement may have prejudiced the defendant's request for a second degree murder charge. First, the record clearly demonstrates that the defense, in its opening statement, explained that petitioner killed his family (Tr. at 639-55). At the conclusion of the opening statement the defense attorney explained that if each murder was separate from the others and not part of the same transaction, they should come back with four first degree murder verdicts. Thus, even if the jurors were aware of counsel's alleged pre-trial statement to the press, they heard essentially the same thing during defense counsel's opening address and there was no resulting prejudice.

Nor can petitioner show any prejudice attached to his request for a second degree murder charge as a result of his counsel's pre-trial statement. As noted in the analysis of

Claim IV, the trial court determined that Buchanan was not entitled to a second degree murder based on the evidence presented at trial. This court agrees with the trial court and the Virginia Supreme Court's determination that there were no significant facts supporting giving the lesser charge. Buchanan, 384 S.E.2d at 769; Hopper v. Evans, 456 U.S. at 611 (Virginia and federal standard both require instructions on lesser included offenses only where evidence supports a rational finding of that offense by factfinder). In Virginia, a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." Clark v. Commonwealth, 257 S.E.2d 784, 789 (1979), cert. denied, 444 U.S. 1049 (1980). Neither the law of Virginia, nor the facts, supported giving a second degree murder instruction to the jury. Thus, Buchanan has failed to make an adequate showing of prejudice on either ground and is not entitled to relief on Claim XIIE.

Claim XIIF: Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

Petitioner also argues that his trial counsel was ineffective for failing to object to Mr. Meeks' prosecution of the case. The Commonwealth Attorney had previously represented Buchanan's grandparents against his father in contested visitation proceedings involving Buchanan in 1984 (2/17/94 Tr. 1).[30] The grandparents alleged during the custody proceeding that petitioner was being abused and that led him to run away from home on several occasions. Mr. Meeks explained the situation to the trial judge and to petitioner's trial counsel. Buchanan's

[30]Although petitioner claims that the Commonwealth's Attorney, Mr. Meeks, represented him in juvenile court when he was a runaway, state *habeas* proceedings indicated that Meeks' representation of Buchanan's maternal grandparents was his only professional connection to Buchanan's previous court appearances. Buchanan offers no evidence to the contrary in his present petition.

trial counsel examined the record and determined that there was no conflict and the trial judge did not perceive a problem with Mr. Meeks' representation of the Commonwealth (2/17/88 Tr. 2).

This court cannot say that the defense counsel's acceptance of Mr. Meeks' representation of the people constituted anything other than valid trial strategy under Strickland. In addition, while a prosecutor's participation in a case has been found prejudicial if he has represented the defendant in the past, See United States v. Schell, 775 F.2d 559, 565 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986), Mr. Meeks' role in legal proceedings involving Buchanan was much more attenuated and did not rise to the level of constitutional concern. If anything, counsel could reasonably have believed that the Commonwealth Attorney's awareness of petitioner's difficult childhood would only help Buchanan's situation. Douglas Buchanan admitted to killing his family and only wished to persuade the jury that the killings were: 1)a set of separate occurrences and not one "transaction," and 2)committed in the heat of passion. In order to prove the latter during the sentencing phase, Buchanan put on evidence about his mother's death and his stepmother's treatment of him. Mr. Meeks was aware of all that and the sympathy such knowledge would engender could only have helped petitioner at trial.

Further, the only specific "fact" of prejudice which petitioner brings forth deals with Mr. Meeks' cross examination of Buchanan's aunt, Audrey Bowling, at the change of venue motion of February 17, 1988. Ms. Bowling was testifying regarding the adverse publicity the case had received and appeared as a witness for the defense in favor of changing venue. (2/17/88 Tr. 5-14). However, Mr. Meeks asked only one question which had anything to do with the prior custody disputes: "Weren't you a participant in the custody -- in the fight for the custody, I believe you were a witness in that, weren't you?" (2/17/88 Tr. 12). That inquiry was intended only to bring

out Ms. Bowling's bias in favor of her nephew and could have been asked by any other Commonwealth's attorney. Mr. Meeks' participation in the earlier custody dispute simply did not provide him with a "leg up" in Ms. Bowling's examination, as petitioner alleges. According to petitioner's own statement of the arguments supporting this court's grant of the writ, then, this court can find no prejudice under Strickland because Mr. Meeks' cross examination of Ms. Bowling at the change of venue motion was not substantially enhanced by his previous representation of Buchanan's grandparents in the custody dispute. 466 U.S. at 689.

Claim XIIG(1): Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. See Teague, 489 U.S. at 298; Bassette, 915 F.2d at 935-37.

Claim XIIG(2): Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

Buchanan also asserts that his counsel were ineffective in failing to object to the trial court's order that the report of defense psychiatrist Dr. Robert Brown be turned over to the Commonwealth and its expert witnesses prior to the sentencing phase of his trial. Buchanan also complains that his counsel failed to demand a simultaneous exchange with the report of the Commonwealth's expert witnesses.

The same standards for determining ineffective assistance of counsel applicable to trial also apply to claims of ineffective assistance at the penalty phase of a capital trial. Strickland, 466 U.S. at 686. Accordingly, assessing the conduct of counsel here requires an effort to eliminate the distorting effects of hindsight, and an attempt to understand the conduct from the attorneys' perspective at the time their decisions were made. Id. at 689. Buchanan has the burden of showing that the actions of counsel were both incompetent and prejudicial according to the Strickland interpretation of those terms.

The Commonwealth establishes that the conduct of petitioner's trial counsel was neither incompetent nor prejudicial. Respondent points to Va. Code Ann. §19.2-264.3:1D, which requires a criminal defendant who wishes to present psychiatric or psychological evidence as a mitigating consideration during the penalty phase of a capital murder trial to provide the Commonwealth "the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation . . . ." Likewise, subsection F of Virginia Code section 19.2-264.3:1 requires a criminal defendant who wishes to use psychiatric evidence to submit to an evaluation by experts for the Commonwealth. After the Commonwealth's experts perform their evaluations, they are required to report their findings to the attorneys for the Commonwealth and for the defense. Va. Code Ann. § 19.2-264.3:1F(1).

The actions of defense counsel in the present case demonstrate that they were aware of the provisions of the Virginia statute and reasonably assumed that an objection to the trial court's order to turn over Dr. Brown's report would easily be overruled. Also, the record

indicates that the Commonwealth did request its experts to conduct an evaluation of the defendant, and that the experts sent their findings to the Commonwealth's Attorney and to the attorneys for the defendant approximately one week before the sentencing phase of the trial was conducted. The actions by the court, the Commonwealth, and Buchanan's trial attorneys show that all parties complied with the law of Virginia. Buchanan's arguments that his attorneys were incompetent in failing to do otherwise is without merit. Further, given the circumstances and the requirements of Virginia law, petitioner cannot effectively argue that he was prejudiced by the conduct of his trial counsel on this issue. Petitioner is not entitled to *habeas* relief based on this claim.

Claim XIIH: Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

The court finds that Buchanan was not deprived of adequate representation because of his attorneys' alleged failure to obtain the written guilt phase verdicts before the sentencing phase of the bifurcated trial commenced. Apparently, petitioner harkens back to the fact that the trial jury found him guilty of both the single capital murder of Douglas McArthur Buchanan, Sr., Joel Jerry Buchanan, Christopher Donald Buchanan, and Geraldine Patterson Buchanan, as well as four first degree murders for each of the victims individually. Buchanan contends that the jury's verdict violated his Fifth Amendment right to be free from multiple punishments for the same offense. Counsel's alleged ineffectiveness is contended to have arisen from petitioner's trial counsel failing to cure the verdict "defect" before Buchanan was sentenced to death by the jury.

Any defect resulting from petitioner's conviction of both the greater capital offense and the lesser murder charges was cured by the courts of the Commonwealth. See Buchanan, 384 S.E.2d at 772. Petitioner was simply never entitled, at any time, to pick and choose among the several jury verdicts – "keeping" the first degree murder convictions and "throwing out" the one for capital murder. When a defendant is convicted of lesser included offenses and a greater offense at the same trial, the proper remedy under Virginia and federal law is to vacate both the conviction and sentence of the lesser included offense while leaving in place the conviction for the greater crime. Brown v. Commonwealth, 279 S.E.2d 142, 145 (Va. 1981), citing United States v. Buckley, 586 F.2d 498, 505 (5th Cir. 1979). The Virginia Supreme Court has already corrected the situation by vacating the first degree murder conviction for the killing of petitioner's father. Buchanan, 384 S.E.2d at 773. Thus, even if everything Buchanan contends is true about counsel's deficient performance, the correction made by the state supreme court leads to the conclusion that petitioner has suffered no prejudice under Strickland.

Claim XIIIA: The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

At the end of his petition, Buchanan alleges that the court and the prosecution committed several other constitutional violations. Included in these claims is petitioner's assertion that the trial court violated his sixth, eighth, and fourteenth amendment rights when it refused to allow petitioner to undergo additional neurological testing following the trial and sentencing phase of the capital murder conviction. Specifically, Buchanan sought at his

sentencing hearing[31] to be tested for a rare form of epilepsy that some psychologists believe may be linked to abnormal and violent behavior in young people. He now claims that the trial court's denial of his request to undergo testing for this particular disorder unconstitutionally deprived him of potential mitigating evidence.

The Commonwealth retorts that a criminal defendant does not have a federal constitutional or state statutory right to "shop around" for an expert that will present the most favorable opinions. See Pruett v. Thompson, 771 F.Supp. 1428, 1441 (E.D.Va. 1991); see also Poyner v. Murray, 964 F.2d 1404, 1418-20 (4th Cir.), cert. denied, -- U.S. --, 113 S.Ct. 419 (1992) (attorney's failure to look for psychiatrist willing to testify to psychological disorder does not constitute ineffective assistance). The government also explains that in this case, Buchanan underwent a complete neurological examination and diagnosis prior to his trial. Petitioner's request for additional testing was based upon an article in the American Journal of Psychiatry that was published shortly after his sentencing. The article was admitted into evidence during petitioner's sentencing hearing. Petitioner's psychiatric expert also testified at the sentencing hearing that the opinion expressed in the article -- the idea that temporal lobe epilepsy may produce violent behavior in young people -- is a controversial position among experts on epilepsy. Given this background, the Commonwealth asserts that the issue presented by petitioner is an evidentiary matter only, and does not raise a federal or constitutional issue.

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[31]Buchanan's sentencing hearing was conducted on August 19, 1988. At that time, the court considered the pre-sentencing report that was prepared for all the convictions other than the capital murder conviction, and the post-sentencing report regarding the capital murder conviction. Petitioner's trial counsel presented a motion for additional neurological testing, arguing that the court's ruling on the motion could affect its consideration of both the pre-sentencing and the post-sentencing reports.

Petitioner argues that he should have the opportunity to present all of the possible mitigation evidence available to him. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, J.) (because the death penalty is qualitatively different than other forms of punishment, the sentencer should not be precluded from considering any aspect of the defendant's character, record, or circumstances of the offense as a mitigating factor). Petitioner also relies upon Ake v. Oklahoma, 470 U.S. 68 (1985) in asserting that the court's refusal to permit the additional psychological testing was a violation of constitutional rights.

The Ake case, however, involved circumstances markedly different from petitioner's situation. In that case, the defendant was suspected of suffering from a severe mental illness. Following the defendant's arraignment, the court ordered him to be examined by a psychiatrist to determine whether he was competent to stand trial. 470 U.S. at 71. The defendant was initially deemed incompetent to stand trial, but when a course of drug treatment was administered, the defendant stabilized and proceedings against him were resumed. Id. at 71-72. The defendant's attorney informed the court that he wished to pursue an insanity defense, and requested that the court arrange for a psychiatrist to examine the defendant. Id. at 72. The trial court refused, and the defendant was convicted of two counts of first degree murder and two counts of shooting with the intent to kill. Id. at 72-73. At the sentencing phase, the government presented the testimony of the state psychiatrists who had conducted the initial examination of the defendant following the killings. Those experts testified as to the defendant's future dangerousness. The defendant did not have expert psychiatric testimony to rebut this evidence or to present evidence in mitigation. Id. at 73. The United States Supreme Court took up the issue of whether the defendant should have been provided with a psychiatric

examination on the defendant's direct appeal. The Court reversed the conviction, holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Id. at 74. In arriving at its conclusion, the Court reasoned that criminal defendants should have a fair opportunity to present his defense, and that a state's interest in conserving state funds should not come at the expense of fair and accurate criminal proceedings. Id. at 83. The Court did limit its holding, however, to cases in which the defendant's mental condition is seriously in question. Id. Where the defendant's mental condition is at issue, the Court found that the defendant should be "fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

In the present case, the court is of the opinion that the requirements of Ake were met when Buchanan received a complete psychiatric examination and diagnosis before going to trial. The psychiatric assistance provided to Buchanan allowed him to determine the viability of an insanity defense, and permitted him a fair opportunity to present mitigating evidence during the sentencing phase of his trial. Ake does not require the state to provide criminal defendants with unlimited opportunities to explore any and every psychological condition that could potentially produce mitigating evidence.[32] In this case, the court believes that Buchanan

[32]In fact, the Ake Court specifically determined that its "concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel, we leave to the States the decision on how to implement this right." 470 U.S. at 83. In this case, the Virginia Supreme Court determined on direct review that the trial court did not abuse its discretion in denying additional testing; this court assumes that this decision reflects the law of Virginia.

had a fair opportunity to present the jury with enough evidence of his mental condition to allow it to make a reasonable determination of sentence.

Also as part of this claim, petitioner makes the bald assertion that the trial court denied him his constitutional rights by refusing to allow Dr. Jerome G. Miller to testify as to the interviews he had conducted in preparing his evaluation of Buchanan. The court also refused to allow Dr. Miller to testify on the medical positions and writings of Dr. Jonathan H. Pincus, who authored the article in the American Journal of Psychiatry about the potential effects of temporal lobe epilepsy, and refused to admit letters written to Dr. Miller from Dr. Pincus and Dr. Breeshire. Buchanan argues that, as a result, he was unconstitutionally denied the right to present mitigating evidence at his sentencing hearing. The record reflects, however, that both Dr. Miller and Dr. Brown were allowed to testify as to their observations about Buchanan and to give their opinions on whether additional testing was likely to uncover further mitigating evidence. The evidence that was excluded by the trial court consisted of hearsay statements and the opinions of other doctors who had never examined petitioner. The court is of the opinion that this evidence was not itself evidence of mitigation, and that Buchanan was able to present all the reliable and relevant mitigation available to him at the sentencing hearing. The trial court's evidentiary decisions in this case did not deprive petitioner of his constitutional rights.

Claim XIIIB: **The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.**

Buchanan raises this claim under the Eighth Amendment, which bars arbitrary and capricious imposition of the death penalty and prohibits procedures which needlessly undermine the reliability of the capital sentencing process. See Johnson v. Mississippi, 486 U.S. 578, 584 (1988)(special need for reliability in capital case); Beck v. Alabama, 447 U.S. 625, 638 (1980); Gregg, 428 U.S. at 189. Buchanan argues that withholding information about his parole eligibility left the jury with a distorted view of the penalty choices, making their decision for death unreliable.[33] In the absence of the requested instruction, he contends, the jury could have formed the impression that if they did not sentence Buchanan to death, he would soon be out in society again.

The court finds no merit to Buchanan's Eighth Amendment claim. The United States Supreme Court has held that federal courts generally must defer to a state's determination about what a jury should and should not be told at sentencing about the defendant's prospects for parole, pardon or sentence commutation. California v. Ramos, 463 U.S. 992, 1013-14 (1983). And as the Virginia Supreme Court noted in affirming Buchanan's death sentence on direct appeal, Virginia juries are to impose an appropriate sentence under the applicable criminal statutes without regard for what might happen to that sentence later, such as possible sentence commutation or parole release. Buchanan, 384 S.E.2d at 774. See also Poyner v. Commonwealth, 329 S.E.2d 815, 828, (Va.), cert. denied, 474 U.S. 865 (1985); Turner v.

[33]Had Buchanan received four life sentences for the murders under the law in force at the time of the killings, he would likely not have been eligible for parole consideration until he had served at least twenty years in prison. See Va. Code Ann. §53.1-151(D).

Commonwealth, 273 S.E.2d 36, 47 (Va. 1980). This Virginia rule precluding jury consideration of parole in sentencing has been upheld by the United States Court of Appeals for the Fourth Circuit against constitutional challenge in cases similar to Buchanan's.[34] See Peterson v. Murray, 904 F.2d 882, 886-87 (4th Cir.), cert. denied, 498 U.S. 992 (1990) and Turner v. Bass, 753 F.2d 342, 354 (4th Cir. 1985), rev'd on other grounds sub nom Turner v. Murray, 476 U.S. 28 (1986).

In any event, the court finds no basis upon which the jury was misled by the lack of the desired instruction in Buchanan's case. Had the jury sentenced Buchanan to life instead of death, he would have been eligible for parole and, although twenty years imprisonment is a long time, he was a young man at the time of sentencing, only twenty years old. The common sense interpretation of "life sentence" left to the jury in the absence of a specific instruction about Buchanan's parole eligibility may have benefited Buchanan, letting the jury speculate that four life sentences plus the years on the firearms offenses would keep him in prison until he was an old man. Moreover, the jury imposed the death penalty based on its finding that the murders were vile, not on a finding that Buchanan was a future danger to society. As parole release is only relevant to the aggravating factor of future dangerousness, it is inconceivable

[34]In their discussions of this claim, both parties have mentioned Simmons v. California, 114 S.Ct. 2187 (1994). The court does not find this case to be controlling of the relevant issues in Buchanan's case. Although the United States Supreme Court, in Simmons, recognized a limited, due process right to a parole ineligibility instruction in capital sentencing, only two justices on the Simmons court would have found an Eighth Amendment right to the instruction in all death penalty cases, while six justices noted the continued viability of California v. Ramos and the right of the state in most cases to determine proper jury instructions on parole eligibility. 114 S.Ct. at 2196, 2200 (O'Connor, J., concurring).

Buchanan's case is also factually distinguishable from Simmons. If sentenced to life instead of death, Simmons would never have been eligible for parole, and the jury specifically found future dangerousness as the aggravating factor making Simmons eligible for the death sentence. Simmons, 114 S.Ct. at 2190-91. Buchanan, on the other hand, would have been eligible for parole in approximately thirty years on multiple life sentences, and the jury in his case was not even instructed on future dangerousness as a possible aggravating factor.

that knowing Buchanan's parole eligibility would have changed the jurors' minds about the vileness of the crime. This claim must be dismissed accordingly.

Claim XIIIC: **The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.**

Counsel wanted to make a general statement to the venire persons about the *voir dire* process, but the trial court refused their request. This claim does not withstand the respondent's motion. The only real issue with respect to jury panel questioning is whether the trial judge's *voir dire* was sufficient to impanel an impartial jury. United States v. Larouche, 896 F.2d 815, 830 (4th Cir.), cert. denied, 496 U.S. 927 (1990). Further, defense counsel were presented with an adequate opportunity to engage the venire persons themselves. At Buchanan's trial both sides were permitted to question the prospective jurors individually, and at length. In addition, there is no constitutional requirement that a trial judge submit any specific form or other statement proffered by the defense counsel to the jury. See United States v. Bakker, 925 F.2d 728, 733-34 (4th Cir. 1991). Thus, this claim fails on its merits as well.

Claim XIIID: **Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.**

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of Slayton. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, Justus, 897 F.2d at 713, Buchanan has failed to

show cause for his default of this claim, and this court is barred from considering it on the merits. See Coleman, 501 U.S. at 750.

XIIIE. **Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.**

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of Slayton. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, Justus, 897 F.2d at 713, Buchanan has failed to show cause for his default of this claim, and this court is barred from considering it on the merits. See Coleman, 501 U.S. at 750.

Buchanan has moved for discovery of these tapes. However, inasmuch as the court has found the claim to be barred from federal *habeas* review, the court also finds discovery in conjunction with this claim to be unwarranted. Buchanan's discovery motion must be denied.

V. CONCLUSION

In accordance with the foregoing, it is the opinion of the court that the Commonwealth's motion to dismiss must be granted and that Buchanan's petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, must be denied. After full review of the record and arguments, the court finds petitioner's claims to be either procedurally barred from review by this court or without merit. Because no genuine issues of material fact remain in dispute, the court finds no justification for an evidentiary hearing. As petitioner is not entitled to relief

upon any claim presented, the entire petition must be denied. An appropriate order shall be entered this day.

Petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to petitioner and to counsel of record for respondent.

ENTER: This 25th day of January, 1996.

James C. Turk
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 27, 1997

No. 96-4
CA-93-306-R

DOUGLAS MCARTHUR BUCHANAN, JR.

Petitioner - Appellant

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections; COMMONWEALTH OF VIRGINIA

Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. Amend XIV, § 1. All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 848(j) Continuing Criminal Enterprise - Proof of aggravating and mitigating factors. Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (E) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

Va. Code Ann. § 19.2-264.4B Sentence proceeding. --B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii), the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

LA. CODE CRIM PRO. art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

MO. ANN. STAT. § 565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized

1. In all cases of murder inidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record o be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting

attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

ions of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;

(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo;

(16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo;

(17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

S.C. CODE ANN. § 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

***

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44- 53-440, or 44-53-445; or

(h) physical torture.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent, or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of anothely impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

The jury, if it does not recommend death, after finding an aggravating circumstance or circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment as provided in subsection (A). In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge share dismissing the jury, the trial judge shall question the jury as to whether or not it found an aggravating circumstance or circumstances beyond a reasonable doubt. If the jury has found an aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.

KY. REV. STATE. ANN. § PRESENTENCE HEARINGS; AGGRAVATING OR MITIGATING CIRCUMSTANCES; INSTRUCTION TO JURY

(2) In all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating or mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

1. The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;

2. The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree;

3. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one (1) person in a public place by means of a destructive device, weapon, or other device which would normally be hazardous to the lives of more than one (1) person;

4. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit;

5. The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;

6. The offender's act or acts of killing were intentional and resulted in multiple deaths; and

7. The offender's act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff engaged at the time of the act in the lawful performance of his duties;

(b) Mitigating circumstances:

1. The defendant has no significant history of prior criminal activity;

2. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime;

3. The victim was a participant in the defendant's criminal conduct or consented to the criminal act;

4. The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct are not sufficient to constitute a defense to the crime;

5. The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor;

6. The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to constitute a defense to the crime;

7. At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime; and

8. The youth of the defendant at the time of the crime.

(3) The instructions as determined by the trial judge to be warranted by the evidence or as required by KRS 532.030(4) shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, or imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty--five (25) years of his sentence, shall designate in writing, signed by the foreman of the jury,

the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases, the judge shall make such designation. In all cases unless death penalty or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall not be imposed.

Ill. Rev. Stat. ch. 5/9-1. First degree murder--Death penalties--Exceptions--Separate hearings-- Proof--Findings--Appellate procedures--Reversals

(c) Consideration of factors in Aggravation and Mitigation.

The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death.

(4)

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No. 96-8400

Supreme Court, U.S.
FILED
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DOUGLAS McARTHUR BUCHANAN,

Petitioner

v.

RONALD J. ANGELONE, DIRECTOR, et al.

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

In a case where the petitioner concedes that he slayed his entire family, including his father, step-mother and two juvenile siblings, should this Court stay the execution and grant certiorari to review:

1. A claim that Virginia is required to give the jury a list of "mitigating" factors even though it long has been established that Virginia's sentencing instruction to "consider all of the evidence," coupled with its verdict form affirming that the jury in fact considered the evidence in mitigation, satisfies the Eighth Amendment?

2. A routine evidentiary claim that the petitioner was entitled to present hearsay statements made to his sentencing-phase mental health expert during interviews conducted by the expert in preparation for his trial testimony?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

INTRODUCTION

Douglas Buchanan's execution is scheduled for April 8, 1997, at 9:00 p.m. On December 30, 1996, a panel of the United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's denial of Buchanan's petition for a writ of habeas corpus and the entire Fourth Circuit denied rehearing on January 27, 1997. Buchanan fails to meet the standard for the granting of a stay of execution and fails to present any compelling reason why this Court should review his case.

STATEMENT OF THE CASE

A. The Crimes[1]

> The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that date, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.

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[1] The statement of facts of the crimes is taken verbatim from the Virginia Supreme Court's opinion. See Buchanan v. Commonwealth, 238 Va. 389, 394-396, 384 S.E.2d 757, 760-761 (1989).

Buchanan found his father outdoors behind the house. He explained having the rifle by telling his father that he had been squirrel hunting. The two went inside where they engaged in conversation. They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother. Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.

Fifteen minutes later, Buchanan heard his brothers arriving from school. He stood waiting behind the living room door, rifle in hand. Donnie, who was ten years old, came in first and walked past Buchanan who shot him in the back of the head. Buchanan then placed the rifle to Donnie's face and shot him near the right temple.

J.J., who was thirteen years old, heard the shots and started to run. Buchanan went outside to the porch and shot J.J. twice as he ran. He then helped J.J. walk inside the house where he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra

column, severing the windpipe and all major veins and arteries in her neck. She also sustained defensive wounds to her hands.

Buchanan ran from the house through the woods to his parked vehicle. Along the way, he tossed his bloody tennis shoes and the knife into a dumpster. As his wife drove him away, he tossed the rifle out of the window.

B. The Proceedings

Buchanan was convicted by a jury in the Circuit Court of Amherst County, Virginia, of capital murder for the premeditated killing of his father, stepmother, and two step-brothers in a single transaction. Va. Code § 18.2-31(7). The jury also convicted him of the first-degree murders of each victim and of the use of a firearm in the commission of each felony. The jury fixed his punishment for the non-capital offenses at four life sentences plus fourteen years.

After a separate sentencing hearing, the jury fixed his sentence for the capital murder at death. Then, after the third sentencing proceeding required by Virginia Code § 19.2-264.5, the trial court imposed the sentences which had been fixed by the jury. Final judgment was entered on August 19, 1988.

The Virginia Supreme Court consolidated Buchanan's appeal of his capital and non-capital convictions and, after giving them priority review, see Virginia Code § 17-110.2, affirmed the capital murder conviction and death sentence, the firearms convictions and three of the four first-degree murder convictions and sentences in a unanimous opinion. See Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989). Buchanan's petition for a writ of certiorari was denied by this Court. Buchanan v. Virginia, 493 U.S. 1063 (1990).

Buchanan then filed a petition for a writ of habeas corpus in the Amherst Circuit Court and, after an evidentiary hearing, denied the claims and dismissed the petition on December 19,

1991. Buchanan appealed to the Virginia Supreme Court and, on June 25, 1992, that Court refused the petition for appeal. Buchanan's subsequent petition for a writ of certiorari was denied by this Court. Buchanan v. Murray, 506 U.S. 988 (1992).

Buchanan then filed on April 15, 1993, a petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia. The district court dismissed the petition on January 25, 1996, and denied reconsideration on April 8, 1996. The district court's judgment was affirmed by the Fourth Circuit on December 30, 1996. Buchanan v. Netherland, 103 F.3d 344 (4th Cir. 1996). His petition for rehearing and suggestion for rehearing in banc was denied on January 27, 1997, with no member of the court requesting a poll on the suggestion for in banc review.

On March 27, 1997, Buchanan filed this petition for a writ of certiorari along with an application for a stay of execution. He also filed in the Fourth Circuit motions to recall that court's mandate and to stay his execution. Those motions are pending in the court below.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY

This is a straightforward case in which the Fourth Circuit affirmed the denial of federal habeas corpus relief. The court's unanimous opinion is a routine application of settled principles of law to Buchanan's claims. Buchanan's certiorari petition presents no compelling reason for this Court to exercise its jurisdiction to review the decision of the Fourth Circuit. It also presents no "substantial grounds upon which relief might be granted." See Netherland v. Tuggle, 116 S.Ct. 4 (1995), citing Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Buchanan, therefore, is not entitled to a stay of execution. See Delo v. Blair, 509 U.S. 823 (1993).

I. THE STATE AND FEDERAL COURTS PROPERLY AND REPEATEDLY HAVE REJECTED BUCHANAN'S EIGHTH AMENDMENT CHALLENGE TO VIRGINIA'S SENTENCING INSTRUCTION.

Buchanan argues under Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Penry v. Lynaugh, 492 U.S. 302 (1989), that the trial court was required to give the jury specific instructions directing them to consider his age, lack of prior criminal history, and emotional disturbance as facts which allegedly mitigated against imposition of the death penalty. Buchanan's challenge is not new. It has been rejected consistently by the Virginia Supreme Court and the Fourth Circuit. See, e.g., Watkins v. Commonwealth, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1986), cert. denied, 475 U.S. 1099 (1986); Clark v. Commonwealth, 220 Va. 201, 212, 257 S.E.2d 784, 790 (1979), cert. denied, 444 U.S. 1049 (1980); Buchanan, 238 Va. at 416-417, 384 S.E.2d at 773; Clozza v. Murray, 913 F.2d 1092, 1105 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991); Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.), cert. denied, 485 U.S. 1000 (1988); Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985); Buchanan, 103 F.3d at 347-348.

The reason why Buchanan's claim states no Eighth Amendment violation and why the courts uniformly have rejected it lies in the fact that the sentencing instruction and verdict form utilized in every Virginia death penalty case, including Buchanan's, allow defendants to present, without limit, any mitigating evidence ***and at the same time*** fully allow for the jury's consideration of all the evidence. The instruction and verdict form used in Buchanan's case provided as follows:

Instruction No. 1-P

You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph,then you ***may*** fix the punishment of the Defendant at death ***or if you believe from all the evidence*** that the death penalty is not justified, then you ***shall*** fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment. [Emphasis added].

Verdict Of Jury

We, the jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, ***and having considered the evidence in mitigation*** of the offense, we unanimously fix his punishment at death. [Emphasis added].

As the instruction clearly shows, jurors in Virginia are instructed to consider ***all*** the evidence and given the option to impose a life sentence even if they find the existence of an aggravating factor. And, as the verdict form clearly shows, the jurors certified that they in fact had considered the evidence in mitigation of the death penalty. See Buchanan, 103 F.3d at 348; Jones v. Murray, 947 F.2d 1106, 1120 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992). Indeed, as the Fourth Circuit correctly observed, States are not required under the Eighth Amendment "to adopt specific standards for instructing juries on aggravating and mitigating circumstances." Buchanan, 103 F.3d at 347, citing Zant v. Stephens, 462 U.S. 862, 890 (1983).[2] Moreover, the same sentencing instruction used in Buchanan -- to "consider all of the evidence" -- expressly was upheld in Boyde v. California, 494 U.S. 370, 383-384 (1990), against the same Eighth Amendment challenge Buchanan makes. See also Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 2671-2672 (1993) (Constitution permits the States "to structure the consideration of mitigating evidence").

Unlike the errors in Lockett and Eddings, the Virginia system always has allowed, as it did in Buchanan's case, for the complete presentation of mitigating evidence during the sentencing phase of a capital murder trial. And unlike the error in Penry, Virginia's system does not depend upon narrowly-defined findings like the Texas "special issues" system that can

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[2] Contrary to Buchanan's assertion (Pet. at 16-17), the Fourth Circuit is not "continuing" to "misapply" Zant v. Stephens. The error in Tuggle v. Netherland, 116 S.Ct. 283 (1995), was the court of appeals' reliance on Zant to automatically affirm a death sentence on the basis that evidentiary error only invalidated one of two aggravating factors. Tuggle was remanded for a harmless error review, reaffirmed by the Fourth Circuit, see Tuggle v. Netherland, 79 F.3d 1386 (4th Cir.), cert. denied, 117 S.Ct. 237 (1996), and Tuggle was executed on December 12, 1996. Buchanan's case contains no such error and the holding in Zant that the Fourth Circuit relied upon in Buchanan does not involve in any way the error that was committed in Tuggle.

leave the jury without a mechanism by which it can consider some mitigating evidence. Due to Virginia's broad allowance of evidence and its express instruction to the jury that it may impose a life sentence ***even when an aggravating factor is found and no mitigating factor is found***, see Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979), Virginia's sentencing scheme is immune from the constitutional error of which Buchanan seeks to take advantage. In the context of a sentencing proceeding where Buchanan had been permitted to present to the jury extensive evidence about his character and background, and had been permitted to argue that such evidence warranted a life sentence rather than the death penalty,[3] the Constitution clearly did not require that instructions provide any further explanation of the concept of mitigation, much less that particular evidence must be considered as mitigating.

Finally, the Virginia Supreme Court's rejection of Buchanan's claim on direct appeal was neither contrary to, nor an unreasonable application of, this Court's clearly established precedent. See Zant v. Stephens, 464 U.S. at 890; Boyde v. California, 494 U.S. at 383-384.[4]

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[3] Buchanan not only presented extensive testimony concerning mitigating factors, but counsel argued it extensively to the jury at the penalty phase. Counsel told the jury in closing argument that mitigation is "a way to weigh all the facts of a man's background...." and that "practically any factor can be considered in mitigation." (Resp. App. 2-3, attached to this brief).

[4] Buchanan's reliance on Fifth and Eleventh Circuit cases does not demonstrate a split of authority. Two of the three cases he relies on, Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), and Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), were decided before Zant v. Stephens made clear in 1983 that States are not required to give particular jury instructions. And the holding in Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), simply does not apply to Buchanan's case: a clarifying instruction was required in Cunningham because an inconsistency between the written instructions and the judge's oral instructions may have led the jury to believe it could not return a life sentence if it found an aggravating factor. 928 F.2d at 1012. No such case-specific need for further instruction existed in Buchanan's case.

The state court's decision, therefore, may not be reversed in this federal collateral proceeding. See 28 U.S.C. § 2254 (d); see also Caspari v. Bohlen, 510 U.S. 383, 390 (1993)("new rule" doctrine prohibits rulings on collateral review which were not "compelled" by precedent existing at time case became final on direct appeal).

II. BUCHANAN'S DUE PROCESS CHALLENGE TO THE SENTENCING INSTRUCTION STATES NO FEDERAL QUESTION.

Buchanan argues under Hicks v. Oklahoma, 447 U.S. 343 (1980), that he was denied due process because Virginia law allegedly vested him with a right to instruct the jury that certain statutorily-identified mitigating factors existed in his case.[5] Buchanan's claim properly (and easily) was resolved by the Fourth Circuit:

> ...there was no such violation in Buchanan's case because, contrary to his assertion, the trial court's instruction was consistent with the sentencing statute. The statute establishes a capital defendant's right to present mitigating evidence during the sentencing hearing. It neither imposes nor implies an obligation to instruct the jury about specific mitigating factors. Va. Code Ann. § 19.2-264.4
>
> Our reading of the statute is consistent with the Virginia Supreme Court's interpretation. It is clear from that court's decisions that the statute does not require the trial court to list specific mitigating circumstances. See, e.g., LeVasseur v. Commonwealth, 225 Va. 564, 594-595, 304 S.E.2d 644, 661 (1983). Because the jury instructions in this case were consistent with the sentencing statute,

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[5] Buchanan says that the Fourth Circuit erred in relying on the Virginia Supreme Court's interpretation of Virginia's statutes and that it should have found he was entitled to the instructions because the "Legislature" had determined what mitigating factors should be considered by the jury. Obviously, however, the Virginia Supreme Court is the final arbiter of what Virginia law requires, see Estelle v. McGuire, 502 U.S. 62, 68 (1991), and, thus, the Fourth Circuit's reliance on the state supreme court's interpretation cannot constitute error.

Buchanan's due process argument must also fail.

Buchanan, 103 F.3d at 348 (see also Virginia cases cited above at p. 5).

Simply stated, the "Hicks" due process claim is based upon an examination of what process the State has determined is due. In the absence of a state requirement, there is no collorary federal right. Virginia Code § 19.2-264.4 sets forth various factors that a trial court "may" consider for "admission" into evidence. (Resp. App. 4). The statute does not require, however, the admission of particular evidence, much less jury instruction on the statutorily-identified factors. The Virginia Supreme Court, as final arbiter of state law, has determined that juries should not be given a list of mitigating factors lest they believe they may not consider non-statutory factors, and has decided, rather, that they should be directed to consider "all the evidence." See Buchanan, 238 Va. at 417, 384 S.E.2d at 773. Buchanan was not entitled to such an instruction under state law and, therefore, his "Hicks" claim presents no federal issue to review. To hold, as Buchanan urges, that due process required his jury to be instructed on specific mitigating factors even though state law did not require such an instruction, would violate the "new rule" doctrine as well as new § 2254 (d).

III. BUCHANAN'S HEARSAY CLAIM STATES NO FEDERAL QUESTION.

Buchanan argues that under Green v. Georgia, 442 U.S. 95 (1979), the exclusion of hearsay testimony from Dr. Brown, his sentencing-phase mental health expert, denied him due process. As the Fourth Circuit correctly concluded, however, the trial court's ruling "did not rise to the level of a constitutional violation." Buchanan, 103 F.3d at 349.

During the sentencing phase of Buchanan's trial, Dr. Brown testified extensively about

Buchanan's childhood treatment by his father and step-mother and opined that Buchanan had been under extreme emotional distress at the time of the offenses. Id. at 348. When Buchanan attempted to elicit testimony from Dr. Brown concerning what several persons had told him during interviews he conducted in preparation for the trial, the prosecutor objected on the grounds of hearsay. Id. ***The trial judge then offered several times to continue the trial and arrange to bring in the declarants to testify***. Id. at 349. Buchanan's counsel responded to this solution as follows:

> I don't want to do that, Judge. We have enough. I just want to object to your not allowing [the hearsay] in.

Id.[6] The judge then sustained the hearsay objection.

In Green v. Georgia, this Court vacated Green's death sentence on direct review because Georgia's rule that did not allow a hearsay exception for declarations against penal interest prevented the jury from hearing the declarant's ***confession to the murder***. Green, 442 U.S. at 97. That hearsay exception for declarations against penal interest -- an exception which long has been recognized in Virginia, see Hines v. Commonwealth, 136 Va. 728, 744, 117 S.E. 834, 847 (1923) -- does not apply to Buchanan's case. There was no exclusion of another's confession in Buchanan's case. And the inherent reliability of the spontaneous statements excluded in Green, 442 U.S. at 97, did not attach even remotely to the excluded witness ***interviews*** which were excluded in Buchanan's case. In short, as the Fourth Circuit correctly

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[6] Counsel's representation that "We have enough" was an understatement. Dr. Brown's direct and redirect testimony alone spanned almost 50 pages of transcript. (CA4 App. 143-176, 213-227). His testimony covered the extensive interviews he had conducted with Buchanan and other doctors as well as his analysis of treatises, school records and a battery of psychological and neurological tests he had conducted.

observed, "[a]t Buchanan's trial, these compelling circumstances do not appear." Buchanan, 103 F.3d at 349.

This Court has made clear that the Constitution does not establish a "federal code of evidence to supersede state evidentiary rules," see Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 2011 (1994), and that such matters generally are not the province of federal collateral review. See Estelle v. McGuire, 502 U.S. at 68. The Virginia Supreme Court's rejection of Buchanan's claim, see Buchanan, 238 Va. at 416, 384 S.E.2d at 773, was reasonable. It therefore may not be reversed. See 28 U.S.C. § 2254 (d); Caspari, 510 U.S. at 390.

CONCLUSION

Buchanan concedes that he is guilty of the capital murder of his entire family. (Pet. at 4). His sentencing proceeding was conducted pursuant to state procedures which consistently have been upheld as constitutionally valid. There is no compelling reason or substantial ground upon which this Court should stay his execution or grant review of his case. The petition for a writ of certiorari and application for a stay should be denied.

Respectfully submitted,

RONALD J. ANGELONE, DIRECTOR, et al.,
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RESPONDENTS' APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF AMHERST

COMMONWEALTH OF VIRGINIA

V.

DOUGLAS MCARTHUR BUCHANAN, JR.

Filed in Circuit Court
Amherst County, Virginia
JAN 17 1989
Roy C. Lloyd, III
Clerk

Transcript of Proceedings

April 30, 1988

Amherst, Virginia

Volume VI

Pages 1527 - 1668

* * * *

THE HONORABLE ROBERT C. GOAD, PRESIDING

obviously guilty of this offense. He's guilty. We didn't put on any evidence. We're not going to insult you by putting on evidence that's saying Douglas McArthur Buchanan, [illegible] was not guilty. I mean it was overwhelming. And we are going to insult this jury by saying that he wasn't guilty.

There was a question--we had a question, so we presented it to you--whether it was first degree murder, second degree murder--I mean first degree murders or capital murder. And you came to the conclusion that it was first degree murder and one capital murder. We didn't--we pled not guilty for that reason. We didn't plead not guilty because he's not--wasn't guilty of killing the four people.

Now, there is something in the law that's called mitigation. Now mitigation--that doesn't mean that he is--that doesn't mean that he's making an excuse. Mitigation is not excuse. There's no excuse for what he did. But there--the law in its wisdom has given a jury and the court--if it's in the breast of the court--a way to weigh all the facets of a man's background, and the facets of any

pressure that he happened to be under at the time that the act that he's charged with occurred. And if they think, in their wisdom, that there is some factor that has redeeming value or there is some factor that means that he has some, not excuse--but some reason not to get the death penalty, then you have a right to take that into consideration and give him life in prison.

Now, the court--the jury--I keep saying the court, but the court and the jury can consider almost anything. There are certain facts that are set down in the statute, but practically any factor can be considered in mitigation.

Now, one of the factors, for example, is youth. That's set in the code. Youth is one of the factors that you can take in consideration. It doesn't say emotional age. Although Dr. Brown says that his emotional age is ten years of age. But his actual chronological age was nineteen at the time that he did this. That's youth. And you can take his youth in consideration.

Now, it doesn't say that you take his

§ 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be l[illegible]d to, the following: (i) The defendant has no significant history of prior crim[illegible] activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ....., foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ....., foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160; 1990, cc. 316, 754.)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, was caused to be hand delivered to Katherine P. Baldwin, Esq., Assistant Attorney General, 900 East Main Street, Sixth Floor, Richmond, VA 23219 on this 27th day of March, 1997.

Gerald Zerkin

Supreme Court, U.S.
FILED
1997
OFFICE OF THE CLERK

(5)

CAPITAL CASE
1997
EXECUTION DATE

No. 96-8400

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DOUGLAS McARTHUR BUCHANAN,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, et al.

Respondents.

CAPITAL CASE: APRIL 8, 1997 EXECUTION DATE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 96-8400

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DOUGLAS McARTHUR BUCHANAN,
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, et al.
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ARGUMENT

Respondent substitutes the Virginia Supreme Court's recitation of the facts on direct appeal for a discussion of the actual evidence in the case. The relevant evidence at issue here, of course, is that which supported petitioner's requests for jury instructions and his attempt to adduce the excluded claim of his mental health expert. It is that evidence, set forth in Buchanan's Petition, which respondent chooses to ignore.

A. THE FOURTH CIRCUIT'S DECISION THAT A JURY CHARGE WHICH INCLUDES NO REFERENCE TO STATUTORILY DEFINED MITIGATING CIRCUMSTANCES, DESPITE COUNSEL'S REQUEST FOR SUCH INSTRUCTIONS, AND WHICH DOES NOT MENTION THE WORD "MITIGATION," DOES NOT VIOLATE THE EIGHTH AMENDMENT CONFLICTS WITH GREGG V. GEORGIA, LOCKETT V. OHIO, CALIFORNIA V. RAMOS AND THEIR PROGENY, INCLUDING DECISIONS OF THE FORMER FIFTH AND THE ELEVENTH CIRCUITS.

What is most extraordinary about respondent's Brief is its complete silence as to the controlling cases of this Court upon which petitioner has primarily relied, Gregg v. Georgia, 428 U.S. 153 (1976), California v. Ramos, 463 U.S. 992 (1933) and Walton v. Arizona, 497 U.S. 639, 653 (1990). The reason for that omission is self-evident. Respondent simply can not argue, in light of this Court's repeated declaration that juries must be carefully guided as to both aggravating and mitigating circumstances, that the Constitution is satisfied by no guidance at all as to the mitigation side of the sentencing equation?

Remarkably, respondent attempts to avoid the trial court's utter failure to provide the guidance demanded by Gregg and Ramos by reciting verbatim the very instruction which was devoid of any mention of mitigation. He seizes upon the trial judge's instruction to consider "all the evidence," even though that advice plainly does not satisfy the constitutional requirement of "careful guidance." Similarly, his reliance on the *pro forma* recitation in the verdict form, a document the jury need not consider until after it has reached its decision, that the jury has considered the "evidence in mitigation," hardly satisfies the constitutional requirement.

To support his argument that the instructions here were constitutionally adequate, respondent relies, entirely out of context, on the use of an instruction to "consider all the evidence" in Boyde v. California, 494 U.S. 376 (1990), *see, Brief in Opposition at 7.*[1] That decision, however, rather than supporting respondent's argument, serves to demonstrate, quite dramatically, the inadequacy of the instructions in Buchanan's case. In Boyde the "consider all the evidence" instruction played a minimal role in guiding the jury; in Buchanan, jurors were left without any meaningful guidance as to the only real issue at sentencing -- whether the mitigating evidence supported a verdict for a sentence other than death.

The trial court in Boyde, consistent with the request of Buchanan, instructed the jury as to ten specific mitigating circumstances and also provided a "catch-all" instruction directing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse of the crime." 494 U.S. at 373 n.1, 374. Moreover, "extenuate" was defined for the jurors "to mean 'to lessen the seriousness of a crime as by giving an excuse,'" Id. at 381. It was in this context of careful and specific guidance as to the mitigating circumstances presented in Boyde that this Court

[1] Respondent also asserts that the "courts uniformly have rejected" Buchanan's Eighth Amendment claim. *Brief in Opposition at 5 (emphasis added).* That assertion is disingenuous indeed, since, as his own citations demonstrate, the claim has only been rejected by the Virginia Supreme Court and the Fourth Circuit, in the context of reviewing the Virginia rule in Buchanan's case and those of other Virginia capital defendants. *Id.*

mentioned the "consider all the evidence" instruction as additional support for its conclusion that the instructions were adequate when considered as a whole. Id. at 383. Thus, Boyde hardly lends support to the notion that a "consider all the evidence" instruction standing alone -- with no reference to specific mitigating circumstances, no definition of mitigation, no "catch-all" instruction, no discussion of the role of mitigation in the sentencing process, and not even a mention of mitigation, other than in the form with which the jurors announce their verdict -- satisfies the commands of Gregg and Ramos.

Boyde also defeats respondent's suggestion that the presentation of mitigating evidence or the argument of counsel is sufficient to satisfy the Eighth Amendment. Addressing the first point, this Court noted that the "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." 494 U.S. at 384 (emphasis added). In addition, addressing the second point, the Court stated specifically that the argument of counsel could not make up for the absence of adequate instructions. Id. Indeed, if respondent's argument is correct -- that the presentation of, and counsel's argument concerning, mitigating evidence are sufficient to satisfy the constitutional requirement for careful guidance -- instructions are superfluous and Gregg and Ramos are meaningless. Indeed, under respondent's contorted argument, the necessity for instructions is inversely proportional to the evidence and

argument supporting them; they are required only where mitigation is not a substantial element of the defendant's case.

Like the Fourth Circuit, respondent divorces the holding in Zant v. Stephens, 462 U.S. 862 (1983) from its context. *See, Brief in Opposition at 7 & n.2.* The Court's limited holding in Zant is clear:

> [T]he absence of legislative or court-imposed standards to govern the jury in weighing the significance of either or both of th[e] aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.

462 U.S. at 880 (emphasis added). Thus, in no sense was the Court in Zant upholding the failure to mention mitigation or statutory mitigating circumstances. It was simply affirming a state's right not to require that aggravating and mitigating circumstances be weighed.[2] *See, Petition for Writ of Certiorari at 16.*

Lastly, respondent raises in passing new § 2254(d) of Title 28 of the United States Code and the "new rule" doctrine. He neither discusses the retroactivity of the amendments to Title 28, nor presents any analysis of the application of the "new rule" doctrine. To the extent respondent implicitly relies upon the prior decisions of the Fourth Circuit, the "short answer" is the same as in Stringer v. Black, 503 U.S. 222, 237 (1992): the Court of Appeals "made a serious mistake." The requirement that

[2] Contrary to the suggestion of respondent, petitioner has not asserted that the Fourth Circuit's misapplication of Zant in Tuggle v. Netherland, 116 S.Ct. 283 (1995)(per curiam) was the same misapplication as here.

juries be carefully guided as to mitigating circumstances was unmistakably established by Gregg and Ramos, both of which were decided many years prior to Buchanan's trial. Thus, petitioner does not seek a new rule when he protests the refusal of the trial court to instruct the jury as to statutory mitigating circumstances and to "consider the circumstances surrounding the offense, the history and background of [Buchanan] and any other facts in mitigation of the offense."[3]

B. THE FOURTH CIRCUIT'S DECISION UPHOLDING THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY AS TO VIRGINIA'S STATUTORY MITIGATORS CONFLICTS WITH ELEMENTARY PRINCIPLES OF DUE PROCESS AS SET FORTH IN PRIOR DECISIONS OF THIS COURT.

One need look no further than respondent's extraordinary assertion that the state, not the Constitution, determines "what process ... is due," *Brief in Opposition at 10*, to recognize the fallacy in his entire argument. This attempt to stand all Due Process jurisprudence on its head is precluded by, *inter alia*, this Court's specific holdings that, while the substantive law applicable to capital cases is largely left to the states, the procedural requirements imposed by the Eighth Amendment and the Due Process Clause are not.[4] *See*, Ramos, 463 U.S. at 999-1000.

[3] Additionally, assuming *arguendo* that it would be deemed new, the rule sought by petitioner would plainly fall within the second exception to the doctrine, which is applicable to "'those procedures that ... are 'implicit in the concept of ordered liberty....'" Teague v. Lane, 489 U.S. 288, 311 (1989)(citations omitted). *See, Petition for Writ of Certiorari at 25 n.10.*

[4] As Buchanan has noted in his Petition for Writ of Certiorari (at 23), the elementary concept that state law defines the substantive law, but the constitution defines what process is

Contrary to the argument of respondent and the decision of the Fourth Circuit, the issue is not whether state law requires the jury instructions which petitioner sought, but whether, once the state has identified those factors it "'deems particularly relevant to the sentencing decision,'" id. at 1000, *quoting*, Gregg, 428 U.S. at 192, the defendant, as a matter of due process, is entitled to have his jury instructed as to those determinations. Absent this fundamental flaw in his analysis, respondent is left with no defense to the claim at all.

As part of his attempt to mischaracterize Va. Code § 19.2-264.4 as merely an evidentiary statute, respondent urges an interpretation which not only is inconsistent with the language and history of the statute,[5] but which defies the plain declaration of the Virginia Supreme Court as to its meaning: the statute "provides a list of mitigating circumstances which the fact finder is required to consider in pari materia with aggravating circumstances." Smith v. Commonwealth, 248 S.E.2d 135, 145 (Va. 1978), cert. denied, 441 U.S. 967 (1979).

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due applies not just in the context of criminal law.

[5] While the first two sentences of Subsection B first refer to "evidence," without distinction between that which would and would not be favorable to the defendant, the next sentence both references mitigation only and "facts" rather than "evidence." ("Facts in mitigation may include, but shall not be limited to" the circumstances specified).

Respondent also fails to explain why, for example, the General Assembly added mental retardation to the statute, or, for that matter, why the statute even exists, if it governs the admissibility of evidence which, constitutionally, can not be limited in the first place. *See, Petition for Writ of Certiorari at 12 n.7.*

Respondent attempts to solve this problem the same way he attempts to solve the problem posed by Gregg and Ramos: he pretends Smith does not exist.[6] Since respondent's proffered explanation of the statute is plainly wrong, his reliance on Estelle v. McGuire, 502 U.S. 62 (1991), a decision addressing state evidentiary rules, is entirely misplaced.

As another part of its twist on the Due Process Clause, respondent insists that it is solely the responsibility of the Virginia Supreme Court, not the legislature, to determine the nature of Virginia's capital sentencing scheme. *Brief in Opposition at 9 n.5.* Contrary to respondent's argument, however, it is legislative determinations concerning the most relevant sentencing factors that are entitled to federal court deference. *See, e.g.*, Ramos, 463 U.S. at 1000, *quoting*, Gregg, 428 U.S. at 176 ("'The deference we owe to the decisions of the state legislatures under our federal system ... is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'"); Ramos, 463 U.S. at 1000 n.11 ("... [I]n approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of Justices Stewart, Powell, and Stevens did not substitute their views for those of the state legislatures as to the particular substantive

---

[6] The fundamental disingenuousness of respondent's argument is well demonstrated by his assertion, on the one hand, that the Virginia Supreme Court is the "final arbiter" of state law, and, on the other hand, his refusal to acknowledge that Court's interpretation of the sentencing statute.

factors chosen to narrow the class of defendants eligible for the death penalty...").[7]

In short, respondent's Due Process argument (1) is dependent upon an interpretation of the Virginia sentencing statute that is entirely inconsistent with its interpretation by the Virginia Supreme Court, (2) removes from state legislatures the power to determine appropriate sentencing factors in capital cases, and (3), most remarkably, turns all of Due Process jurisprudence on its head by committing to state courts the authority to determine not merely substantive state law, but "what process is due." Plainly, respondent's argument must fail.

C. THE DECISION OF THE COURT OF APPEALS, APPROVING THE TRIAL COURT'S DECISION TO EXCLUDE RELEVANT MITIGATING EVIDENCE UPON WHICH THE EXPERTS FOR BOTH SIDES HAD RELIED, BASED UPON THE MECHANICAL APPLICATION OF A HEARSAY RULE, VIOLATES THIS COURT'S DECISIONS IN GREEN V. GEORGIA AND CHAMBERS V. MISSISSIPPI AND THE RULE OF MONTANA V. EGELHOFF.

Respondent argues that Green v. Georgia, 442 U.S. 95 (1979) is inapplicable to this case because the specific state evidentiary rule at issue there is not the same as the rule at issue in Buchanan's case. Plainly, the rule of Green was never intended to be limited to a single evidentiary rule. Rather, the

[7] That is not to say that a state court is necessarily precluded from making that determination, although respondent has not cited a single case in which deference was given to such a determination by a state court. It is only to say that such determinations are usually made by the legislature, as they have been in Virginia, and that, as in Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980), the state courts may not deprive defendants of the benefit of legislative determinations as to the applicable substantive law.

question under Green is whether the excluded testimony "was highly relevant to a critical issue in the punishment phase of the trial" and "substantial reasons existed to assume its reliability." 442 U.S. at 97. Where those conditions are met, the "mechanistic" application of a state evidentiary rule violates the Due Process Clause. Id.

Here, the evidence was unquestionably "highly relevant" to the critical question of petitioner's mental state at the time of the killings. While Dr. Brown was able to discuss those facts upon which he had relied which had been independently presented in open court, he could not mention any matters which had not been presented.[8] As the prosecutor himself recognized, the reliability of those opinions, as well as that of Dr. Brown, was dependent upon both the facts which were presented and those which were not. (App. E34).

While it is correct that the constitution does not create a "'federal code of evidence...,'" *see, Brief in Opposition at 12, quoting,* Romano v. Oklahoma, 114 S.Ct. 2011, 2011 (1994), it is equally true that the exclusion of relevant exculpatory evidence based upon the "mechanistic" application of state evidentiary rules violates the Constitution. Montana v. Egelhoff, 116 S.Ct. 2013, 2026-27 (1996) (O'Connor, J., dissenting). *See, Petition*

[8] For example, the maternal grandfather spent significant time with Dr. Brown, yet when he testified at trial he did not go into great depth about the family turmoil. When Dr. Brown attempted to discuss additional information which he had obtained from the grandfather, the trial court sustained the prosecutor's objection. (App. E-26, 27).

for Writ of Certiorari at 26. Since the evidence was relevant and exculpatory, its exclusion was improper if "substantial reasons existed to assume its reliability," "[r]egardless of whether the proffered testimony" was admissible under state law. *See*, Green, 442 U.S. at 97.

In Green itself, this Court noted that the most important factor for assessing the reliability of the excluded evidence was that "the State considered the testimony sufficiently reliable to use it[.]" 442 U.S. at 97. That is precisely what happened here. The Commonwealth and its experts specifically relied on the excluded evidence and even testified to its reliability and value. Indeed, in its Brief in the Court of Appeals, respondent himself asserted that "the factual bases for Dr. Brown's opinions were not in dispute." (App. S-1). Thus, the evidence excluded by the trial court was not only highly relevant, but it was "sufficiently reliable" to require its admission.[9] The "exclusion of relevant evidence because of doubts about reliability violates the principle of Lockett [v. Ohio, 438 U.S. 586 (1978)] and Eddings [v. Oklahoma, 455 U.S. 104 (1982)] by interfering with the jury's ability to weigh mitigating factors." Rupe v. Wood, 93 F.3d 1434, 1440 (9th Cir. 1990)(emphasis added).

Respondent also notes counsel's statements that they did not want a continuance to try to bring in the witnesses upon whose statements the experts had relied. The trial court's offer of an

[9] In addition, the same evidence would have been admissible in a civil trial in Virginia. Va. Code § 8.01-401.1.

alternative, albeit impractical, [10] method for introducing the evidence does not negate the fact that the exclusion of the evidence constituted a Constitutional violation. If the evidence, as here, has sufficient indicia of reliability, it may not be excluded simply because the trial court would allow counsel the opportunity to try to obtain the evidence otherwise.

Finally, respondent asserts, without benefit of analysis, that Buchanan seeks a "new rule." As the foregoing discussion demonstrates, he plainly does not. Indeed, the District Court properly observed that respondent's claim that the exclusion of this evidence does not rise to a Constitutional violation is "clearly in conflict with Green v. Georgia." (App. B-p.18).

CONCLUSION

For the foregoing reasons, this Court should grant petitioner a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit

Respectfully submitted,

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[10] Some witnesses, like Buchanan's grandfather, had already been excused, some were old and some were out of state. (App. E-25).

Supreme Court, U.S.
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(6)

No. 96-8400

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS MACARTHUR BUCHANAN, JR.,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

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CHRONOLOGY OF RELEVANT EVENTS

April 28, 1988	Petitioner convicted of one count of capital murder and three counts of first degree murder in the Circuit Court of Amherst County, Virginia
April 30, 1988	The jury fixes the sentence at death
August 19, 1988	Trial judge imposes death sentence fixed by the jury
September 22, 1989	Petitioner's convictions and death sentence affirmed by the Virginia Supreme Court on direct appeal
January 22, 1990	United States Supreme Court denies certiorari. *Buchanan v. Virginia*, 493 U.S. 1063 (1990)
December 19, 1991	State habeas corpus petition dismissed by the Circuit Court of Amherst County
June 25, 1992	Virginia Supreme Court denies the petition for appeal
November 16, 1992	United States Supreme Court denies certiorari. *Buchanan v. Murray*, 506 U.S. 988 (1992)
April 15, 1993	Petition for writ of habeas corpus filed in the United States District Court for the Western District of Virginia
January 25, 1996	District Court denies habeas relief, *Buchanan v. Murray*, C.A. No. 93-0306-R (W.D. Va. 1996)
April 8, 1996	District Court denies motion for reconsideration

December 30, 1996	United States Court of Appeals for the Fourth Circuit affirms denial of habeas relief, *Buchanan v. Angelone*, 103 F.3rd 344 (4th Cir. 1996)
January 27, 1997	Court of appeals denies rehearing
April 28, 1997	United States Supreme Court grants certiorari, *Buchanan v. Angelone*, 117 S.Ct. 1551 (1997)

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE COUNTY OF AMHERST

Commonwealth, Plaintiff

v.

Douglas McArthur Buchanan, Jr.
Defendant

* * *

[809] Doss: Is there anything that happened recently that lead up to it? I mean was it something that had just happened or had it just been building up?

Buchanan: It's been building up since I was – since my real mother died, I mean.

* * *

[881] Doss: Was it your plan to kill all them when you went there?

Buchanan: No, not really. I was – Geraldine, I just – I mean she's burnt pictures of my real mother in front of me and cut them up and threw them away.

Doss: All right.

Buchanan: That's why she was responsible the way everything happened. I mean everything was going good when we first got married but then – I don't know we – it was like, you know, we had our good times – sometimes me and her got along great but then it would always just something would just come up. Like I would just ask to go see my mom's grave, I mean I would let them know I was going so they wouldn't come up and down the road and see me down there and get mad, and then most of the time they wouldn't let me do it. They

just told me that wasn't – I don't know – she just said well I'm your mother now and they s – she said that she was never any kind of mother to you, I mean I wasn't old enough to know her, but still, I mean everybody else told me [882] she was a good mother, you know, but – and now the only picture I have left that I could ever get is just a – a newspaper clipping about how my dad got married. I mean, there were paintings in the house that she burnt and she burnt all the pictures in the – even Chris when uh, we – right after we got married we was sitting in the dining room and they were showing pictures she got out the album – and uhm she was going through them and one of the pictures just had me when I was real little standing beside my mom and the only thing that had her was from the waist down, just her legs. And right there she took and – took a lighter and burned it up. She said I'm not finished with it. And that's been going on ever since I can remember, you know.

* * *

[915] Q So his granddaddy lived on one side and his uncle and aunt lived on the other side and they were the – his mother's relatives?

A That's correct. Yes, sir.

* * *

[919] Q Now, when you went there the fences around the – how many "no trespassing" signs were on those fences, do you know?

A there was one on the gate. There is at least –

* * *

[919] Q Is that the gate between Peggy Bolen, his mother's sister, and that's the side Peggy Bolen, his mother's sister, lived?

A It is the side that Peggy Bolen lives on,

* * *

[919] A And there's one on the front facing the road. Those are the only two that stick in my mind.

[920] Q Okay. And do you remember going to the – it use [sic] to be a gate in there, I believe. Do you remember that gate that's been wired up between his grandfather's house and his house?

A I have heard about it. I never actually examined it. I didn't walk the fence line.

* * *

[923] A Yes, sir. That shows a "no trespassing" sign on the fence.

Q On the grandfather's –

A Facing towards the grandfather.

* * *

[1016] Q How many of your mother's relatives lived around here out there at your house?

A Her sister and brother and parents.

Q Now do you – we know that your mother died when you were what age?

A Nine.

Q And how long had she been sick?

A About three or four years.

Q Do you remember much about that?

A No.

Q Prior to her death, did you have much contact with your mother's family, your aunts and uncles and your grandfather?

A I mostly stayed with them instead of at home.

Q Did both of your parents work when your mother wasn't sick?

[1017] A Yes.

Q Who took care of you when they were working?

A My grandparents.

Q Where did they live in relation to your house?

A Next door.

Q Was it both your grandfather and your grandmother or just one of them?

A Both.

Q Did y'all spend a lot of time with your relatives on holidays and things like that?

A Yeah. On Christmas we usually went to everybody's house.

Q Was it a pretty close family –

A Yeah.

Q – relationship? Did everybody get along okay most of the time?

A Yeah.

Q Now when – do your aunt and uncle have any children? Do they have any –

A Two kids.

Q Are they fairly close in age to you?

A One's 17 and one's 14, I think.

Q Did you play with them when you were little?

A Yeah.

Q Did you have other friends in the area that [1018] you played with?

A Yeah.

Q Now, how was it that your stepmother, Geraldine, came to the area?

A Well, she was my real mother's first cousin. And they came down to visit a lot before that – before she died. And she used to help my dad with things sometimes while my mother was in the hospital.

Q Did she help with things around the house?

A Yeah.

Q And after your mother died, she and your father got married?

A Right. About – within six months later.

Q And at first was there any problem with any of your mother's family?

A No, not for about the first year. Everything went on just like it did before except for on holidays we didn't go around to the houses no more.

Q And what happened that caused things to change?

A I don't know how it started. I just know that one day my parents came into my room and told me that I couldn't speak to them any more.

Q Do you – you don't know what the argument – do you have any idea what the argument was about?

[1019] A It was just that my grandfather and my dad were at the fence and they both just didn't hear each other yell at each other or something like that. I really don't know how it happened. They just decided we couldn't talk anymore.

Q And how old were you at that time?

A Ten, may be eleven.

Q Well, did you play outside in the yard and everything?

A Yeah.

Q Didn't you – did you see your grandfather and your aunts and uncles out there?

A Yeah, but I couldn't wave at them or talk to them though.

Q What would happen if you did?

A Got grounded.

Q What do you mean by grounded?

A Have to go to my room. I wouldn't be able to go back outside.

Q How long would you have to stay?

A Usually all day or all night depending on what time it was.

Q Well, I mean, did – you had a pretty good size yard, didn't you? Weren't you able to see them out there?

[1020] A I had two acres. Yeah, I could see them all the time cause they just lived just right next door to us, maybe fifty yards or so, maybe a hundred – no, about fifty yards.

Q Well, how would your parents know whether or not you waved at them or looked at them?

A They would see me out the window or something. They usually watched and make sure I didn't speak to them.

Q Would your aunts and uncles and grandparents try to speak to you?

A At first they did because they didn't know that I wasn't supposed to speak to them. But after a while my parents and them got in an argument at the fence and they told them I couldn't speak to them anymore. And then they wouldn't try because they didn't know if my parents was looking or not. They just waited for me to wave if I had a chance.

Q Were there occasions where your parents did see you wave, say at your uncle, for example?

A Yeah. Then they'd take me back into the house and wouldn't let me go back outside – sometimes all weekend. I never could to outside the fence.

Q Besides putting you in your room, did they – were there other punishments that they imposed on you?

A Yeah, they used to whip me until I was about [1021] sixteen or seventeen. They'd take me in my room and pull down my pants and hit me with a belt or a fly swatter.

Q When you say a fly swatter, how do you mean?

A They used the metal end instead of the plastic.

Q Did they make you do chores and things like that?

A Yeah, I did most of it. I had to cut the grass and do the garden and make sure the buildings are clean, get the wood.

Q Why did your father and your stepmother not want you to have any contact with your relatives? I mean what –

A They just didn't want – they just didn't want me to think about my mom, I don't guess.

Q Did they tell you that?

A Well, they didn't just come out and tell me, but they did lots of things that, you know, showed it.

* * *

[1022] A Well, besides not letting me speak to my mother's people, they took all the furniture that was hers

out of the house and replaced it and they burnt pictures of her.

Q When your mother died, did you get anything that was hers?

A Just a – well I have – there was a lot of pictures in the house right after she first died, but – and then I got her rings.

Q But where did you keep them?

A I used to keep them in my room and I then I slept with them at night.

Q And what happened to them?

A They took them away from me after I couldn't talk to my grandparents anymore.

Q And you say they destroyed the photos. Did you manage to save any photos?

A Yeah, I saved one up until the time that me and Chris got married and had to move out and then I don't know what happened to that one. It used to be up under my [1023] mattress cause that's where I used to keep it cause they wouldn't find it under there and –

Q Did they know you had it?

A No.

Q Did you just keep it under there all the time or –

A No, I took it out whenever like they weren't home or at night and I could look at it then, but I didn't want them to walk in and catch me looking at it.

Q Did they say things to you about your mother as to why they didn't want you to – why didn't they want you to remember your mom?

A I don't know why, they just didn't. I mean, they just decided – I don't know what was in their minds, I can't say. They said that she cheated on my dad all the time.

Q Well who's – I mean who's idea was it to get rid of everything of your mother's? Was it your father's idea or was it Geraldine's idea?

A Geraldine.

Q Now why – did she say anything that would give you any reason why she wanted to do that?

A She said she didn't want anything of hers in the house.

* * *

[1025] Q Where was your mother buried?

A Right down the road from our house about a mile.

Q Did you go to the funeral?

A Yes.

Q How far down the road from your house was it?

A About a mile, half a mile maybe.

Q After she was buried, did you go visit her grave?

A I did a couple of times, but I wasn't allowed to do that.

Q Why weren't you allowed to do that?

A They just told me I couldn't go. If I'd ask, they tell me not to.

Q Did you try to go anyway?

A I went a couple of times.

Q Did they find out about it?

A Well one time they did, one time they didn't.

Q Well, what happened when they found out about it?

A They just told me I couldn't go back out the [1026] yard for I think it was a week or something like that.

Q You had the fence around the yard at that time?

A Right. Every since I can remember.

Q When did the posted signs go up?

A Some time after they stopped talking. They'd got into an argument at the fence, and so they put up posted signs so that way – make sure nobody come in.

Q Well, you got on the school bus right there at your house, didn't you?

A Right.

Q How did you get on the school – how were you able to – did your cousins go to school with you as well?

A Yeah, they – like they lived right beside us and they went to the end of their yard and I had to stay at our

mailbox though until the bus came. After they got on, then I could walk up there and get on the bus.

Q Did the bus make two stops or did it just stop at one place?

A No, just one. We both had to get on at the same time.

Q What about after you got on the bus? You could see them after you got on the bus, couldn't you?

A Yeah, but I couldn't talk to them. I wasn't suppose to. Sometimes I would, but if somebody said [1027] something I'd get in trouble.

Q Did you have friends come over to the house and visit you and things like that? You still had other friends besides your relatives, didn't you?

A Yeah, but not usually – usually nobody came to the house though. I usually didn't ask anybody up there because if I did, they wouldn't let me. I think one person came when I was in Junior High.

Q Okay. On holidays and things like that you weren't allowed to see any of your relatives then either?

A No, we just stayed home or went to West Virginia.

Q In the past at holidays what kind of things had y'all done together, say Christmas time and things like that?

A In the past? We had – well before my mother died – well really right after she died, too – we'd go around to everybody's house, my grandparents, my aunts and

uncles, and then we'd end up back at my house. But – and then after I couldn't talk to them, we just stayed at home or went to West Virginia.

Q Did your relatives try to give you presents on your birthday and Christmas and things like that?

A Yeah, they used to send them to me, and then my parents would send them back.

[1028] Q Did you get to open them?

A No. They'd just look at the tag and see who they were from.

Q Did they send them to you in the mail or what?

A No, sometimes they would send somebody to give them to me at church or I would get them in the mail. Well, they sent one for everybody, but nobody kept them.

Q They sent presents for your stepbrothers, too?

A Yeah.

Q And they were all sent back?

A Uh-huh.

Q Did you go Christmas caroling and things like that with your relatives?

A As long as my cousins weren't going I was – I could go, but if they were going my parents wouldn't let me go.

Q Is this when you were with your church group, is that when?

A Right.

Q You did – you were allowed to go to church and things like that on Sundays?

A Yeah. I went to – well I had to go to church. And then I could go on the functions like the youth group would have as long as my cousins didn't go, too.

Q And they weren't worried about you seeing your [1029] relatives or anything at church?

A No, cause they didn't go.

Q Did they question you about whether or not you had seen anybody or talked to anybody?

A Yes. Sometimes they would ask me if anybody asked about them, you know, like if anybody said they said hi or something like that.

Q And what if they had?

A Well, if they had I'd probably get sent back to my room again – if they ever heard of it. I always told them no.

* * *

[1030] Q And they would – when – I mean as long as you didn't try to talk to your relatives and everything it was okay, wasn't it?

A Right. I could stay out in my yard as long as I didn't talk to anybody.

* * *

[1032] Q Doug, take a look at this photograph. Is that photo – is that the same photo you had that you hid under your mattress?

A No, it's just like it, but it's the same one, I mean, it's not the same one.

Q Where did you get that one from?

A Audrey gave it to my aunt.

Q When did she give it to you?

A Right after I'd moved out.

Q After you moved out of your parents' house?

A Uh-huh.

Q Is that when you lost the one that you kept under the mattress?

A Yeah, within the two weeks before I moved out.

* * *

[1033] Q Well, Doug living out there did you – were there a lot of confrontations with your relatives – between your parents and your relatives?

A Yeah. They used to argue at the fence all the [1034] time.

Q Who would argue?

A My grandfather and my mother's brother and sister. They'd argue with my parents.

Q Well, what were the – how did the – what would the arguments usually be about?

A Well usually it'd start over nothing.

Q Were you there?

A Somebody would just –

Q Were you out there in the yard when it happened?

A Yeah. Usually somebody would just yell something to somebody over the fence just to make them mad. And then they'd all just pile up around the fence, like on each side of it, and they would argue. And usually they'd tell each other they'd go out into the road and they'd settle it out there cause they didn't want to get on each other's property. And –

Q What would happen if they did that?

A They'd end up in court.

Q Did they do that?

A They went – they took warrants out for each other a couple of times. I don't know whatever happened to anybody but – I don't – they usually pulled guns out on each other or something. Nobody ever shot anything, but they [1035] usually had guns out there.

Q Was it just generally a lot of yelling then, is that what it was?

A Yeah, they'd yell and threaten to kill each other and blow each other's houses up, stuff like that. Usually they would be arguing and me and my Aunt Audrey would just walk on down the fence a little ways and talk cause they wouldn't be worried about me talking to her then because they were too busy arguing.

Q Were there some arguments with your uncle that your father had with your uncle right there at the fence?

A Yeah.

Q What were they about?

A They'd argue. Just threaten to kill each other.

Q How did they get started? Would one be out in the yard working or something?

A Yeah. Well usually the whole family would end up out there on both sides. I really don't know how they started all the time. They just ended up – usually I'd just be playing or something and turn around and they're all over there at the fence arguing or something. Sometimes it'd be because of my uncle, he'd be cutting the grass too close to our fence. And my dad would say he'd seen the fence shake or something like that and that would start an argument. Or my [1036] uncle planted some pine trees a little ways from the fence, and my dad got mad and said they might grow through the fence, so that start another argument.

* * *

[1040] Q Did you try to stand up to your father and your stepmother?

A No, I couldn't do that because then I'd get sent back to my room again.

Q You never tried to stand up to them and get what you wanted?

[1041] A When I turned about eighteen or so, I'd stand up to them. Then me and my dad would get into a fight.

Q What would happen?

A He usually hit me. He didn't do that when I was young though. He just beat me with a belt, but then I got older he hit me.

Q And you didn't fight him back?

A No. I just kind of kept running across the floor or something.

Q Would Geraldine come out and stop y'all from fighting?

A Yeah. One time she come out with the pistol and told us to quit even though we weren't really fighting. He was just hitting me. I was just laying there.

Q Well, when they sent to your room, didn't you – did you try to come back out of your room?

A Yeah. They usually sat on the – where the love seat is at – they usually sat there and made sure I didn't come out my room.

Q What happened if you came out?

A I never came out. I don't know what would have happened. He'd probably whip me again or something. I got out once though. I jumped through the window.

* * *

[1042] Q And you say you – how did you get along with Geraldine?

A We got along – well sometimes we got along great and then sometimes we didn't. I mean, sometimes we didn't get along at all.

Q You said that she burned your photo – she got rid of photographs and burned some stuff that belonged to your mother. And what were the circumstances that that – when that happened? How did you find out about it? How were you aware of it?

A Like I guess she had burned some before because all the pictures in the house were gone, but –

* * *

[1042] A And then one day I come into the kitchen and she was burning all the ones out of the photo albums.

Q She was burning them in the kitchen?

A In the sink. And she just told me to come and look, and when I went over there she was sitting there [1043] burning all my mom's pictures.

Q Is that when you got that one and hid it or had you already done that?

A No, I'd already got that one. All of them were taken out of the house. They had left one in my room. So I just took that one and hid it cause – after I seen her burning all of those.

* * *

[1045] Q When he was talking to you about his suspicions about Geraldine, did he ever talk about your mother?

A Yeah. He usually said she did the same thing. They've said that since I was little.

* * *

[1055] Q Did you talk to them anymore after that?

A No, well I called my dad while I was at Audrey's and told him where I was and I told him I'd see him as soon as I could start moving around, which just took about two or three days. And – but then I went over to B.G. Market and I was going in and dad's car was there and I passed him in the door but he wouldn't – he didn't say – I said hi to him but he didn't say anything to me, so he just walked on out and got in his car and left.

Q And this was – when did this happen?

A About a week after my operation.

* * *

[1055] Q Did you see your father and your – or your stepmother on the road or anything like that any other time?

[1056] A Yeah, I seen them a couple of times on the road and like if they were by theirself they'd wave at me, but if they were together they wouldn't wave.

[1067] Q How was the conversation going with your father?

A It was okay at first for about the first few minutes. We went back into the house and he gave me something to drink. And we were just sitting there just talking. And he asked me how me and Chris were doing. And I said fine. And then I told him I got another job and

I told him where we'd moved to cause he didn't know where I was living. And then when I asked him how he was doing, he said it was just the same old thing and he started bringing up saying that Geraldine was cheating on him again. I think he knew about the post office box then, I'm not for sure.

Q What did you tell him?

A Well, at first I didn't say anything because I didn't want to get into it again, but then I told him well – cause he acted like he – it was really bothering him, you [1068] know – so I told him to just divorce her, but he said he didn't want to get rid of the kids. And then he said it would have been the same way if my mother – if my real mother was alive.

Q Now what was the tone of this conversation that you were having?

A Well, he was yelling at me then cause, I don't know we – he was getting pretty mad at me.

Q Why?

A I guess cause I just didn't agree with him. I just didn't agree with him.

Q Well, when he mentioned your mother, did you say anything back to him?

A Yeah, I just told him that she weren't really that way. I didn't understand why he said that and then –

Q Now how did you feel when he said that?

A I was getting mad. I was sweating. I was getting real hot and I was shaking.

Q Did you try to talk to him about that topic?

A Yeah. And he just stood up and said that's it, let's go out and look at this car I bought for J.J. And it's like he got out of one argument and he started another. Cause, I mean, J.J. was just thirteen and already buying him a car and they didn't buy me one. You know, it's just the way – it didn't really start an argument. It just hurt, you [1069] know, cause they didn't even let me have my driver's license until I was eighteen. I didn't understand why all of a sudden they get him a car and he's not even old enough to have a driver's license yet. They didn't need another car. They had two that run.

Q And then what happened?

A Then he started to walk out the door and I shot him.

Q Why did you do it?

A I don't know. I was just mad. I just was – I don't know really why I did it. I didn't mean to. It just happened.

* * *

[1245] THE COURT: Members of the Jury, give me your attention a minute. We are now beginning the – what we will call the second phase or the phase in which the penalty for capital murder will be determined by you. As I told you in your *voir dire*, the only options are a life sentence or a death sentence. So, that will be what we are dealing with in this hearing.

And then you will be given written instructions and a written verdict form just like you were in the prior

phase. And then you will – after the attorneys make their opening statements and present evidence and argue the matter and the court reads you the instructions, then you retire to your room and deliberate on what the penalty should be in the capital murder case.

Now, it's been agreed and stipulated by the Commonwealth Attorney and by the defendant and his attorneys, that all of the evidence you have heard on the guilt or innocence [1246] phase – which was completed yesterday, all of that evidence – including the testimony of witnesses and all exhibits – all the pictures and all the exhibits that you took with you to your jury room – all those are agreed to be evidence at this second stage hearing. All of that is still evidence in the case. That's agreed.

There will be testimony of witnesses and probably other exhibits offered in this trial – in this part of the trial. So with that then, Mr. Meeks, you – do you want to – are any witnesses to be separated – called and separated?

* * *

[1249] MR. MEEKS: Thank you, Judge. Ladies and gentlemen of the jury, as the court has already advised you, you are able to consider all of the evidence that you've heard since you first came into this courtroom several days ago. That primarily will be the evidence that the Commonwealth is presenting you to meet the second burden of proof which the Commonwealth has and that is primarily to demonstrate to you that the defendant – what he did was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity or

aggravated battery. The court will give you the instruction on that at the appropriate time.

We will recall to you when we make our [1250] closing arguments, as we recall to you now, the rather specific evidence that was given to your during the trial. You will recall the testimony of Dr. Massello, I will refer to it several times. You will recall the testimony of Officers Doss and Viar and the statements that were made, and how they matched up against the defendant when he testified yesterday. You can consider all of that. And apparently you have resolved some of the conflict by the verdict that you brought in last night.

Now there will be additional evidence today, probably by both sides. But I suggest to you that it will basically be nothing new under the sun. You have already heard how the crimes occurred. How horrible they were. How violent they were. And how each victim received more than was necessary merely to kill them – which is pretty much the standard under the law.

You also have heard – and I think I conceded it, too, in my closing argument last night – that Douglas Buchanan had a troubled childhood. He had parents that quarrelled [1251]. He had parents that did not let him deal with his grandparents. He had a number of problems of growing up. You will hear more of that today. You will probably hear it from his grandfather, his Aunt Audrey, whose name you've heard several times. You will hear it from Reverend Campbell of the Cornerstone Baptist Church. And you've heard his name many times. And you will near it from people who lived in that neighborhood.

You will also in the defense perspective hear from Dr. Brown, a psychiatrist and psychologist from over in Charlottesville. And we suggest it will be nothing more than a scientific version of exactly what you've already heard. But you certainly ought to – you're going to have to weigh all of that.

You will also hear from Drs. Lee and Gwaltney from Central State Hospital. They are forensic psychologists who have weighed the same evidence or much of the same evidence as Dr. Brown. And they have their conclusions. I think you will find that their conclusions don't materially differ. They will differ in shades or degrees. They don't [1252] really differ in the conclusion themselves.

But as I pointed out to you, once you weigh all of this rather specific scientific evidence, you will find that nothing new has really been placed before you. What you will have to do at the end of his hearing, is you will have to balance, as we suggested early on – you will have to balance these things that are in his favor against these horrible things that he has done. And you will have weigh – you will have to decide what the case is worth.

Now, I might as well tell you at this phase of the trial because I think you are entitled to know it – if I'm going to ask for it, you have to be advised of it – the Commonwealth is seeking the maximum penalty. And the Commonwealth will ask you to return the death penalty at the end of this phase. And you should know that up front. It shouldn't be anything that you are not aware of.

You may near during arguments phrases like somebody wants somebody to be killed, and things like that. I

hope that you will weigh [1253] those types of statements appropriately, and realize that lawyers sometimes use emotional appeal to try and sway juries. Ask you to restrain your considerations to the facts you have heard from the stand, what comes from here or off the screen or on the pictures. Deal with the evidence and not the craftiness of the lawyers.

With that in mind, I will yield the floor to Mr. Poindexter. Thank you.

THE COURT: Mr. Poindexter.

MR. POINDEXTER: Thank you, Mr. Meeks. May it please the Court, ladies and gentlemen of the jury, I don't know whether that was a compliment or an insult for him to say that I was crafty. But in my – and I, you know, I wonder about me being crafty here today. We, in the guilt phase of this case, put him on the stand. He talked about his statements. We gave those – we admitted that he gave those statements. He told you – he admitted what he'd done. So if I'm crafty, that is a very unusual way to be crafty.

The question here today – the issue that we have here today – is not his guilt or [1254] innocence. You've already decided that. You've decided that he's guilty. And you've already given him – it's not decided – severe punishment. That's not the question. You've given him severe punishment. He has four life sentences and fourteen years right now.

The question is whether he's going to be executed. That's the question this jury has in front of them. That's

the question. Whether he's going to be executed. Because that is the only question that we have left in this case.

Now, as Mr. Meeks told you, he has – the Commonwealth still has the burden just as it always does – just like Mr. Meeks had when he got the guilty verdict. He had the burden to convince you beyond a reasonable doubt that Doug was guilty of these crimes. And he did that and you returned your verdict. Well, that burden still follows him into this phase. It hasn't got anything to do with guilt, but it follows him into this phase. They have the burden to prove that he should be executed. That's what it amounts to.

Now, I'm allowed to put on mitigation. [1255] And we are going to present – you've heard a lot of this from Doug. He told you about his people. And from other witnesses. We are going to put those people on so you can near them. We want you to hear his relatives as to what happened. We have a doctor here that has done considerable research. We want you to hear that doctor.

And at the end of all this evidence, we are going to ask – and what I say is not evidence. I mean I'm, you know, I'm just a lawyer. Lawyers don't give any evidence. And what Meeks says is not evidence. We are lawyers. We don't have evidence. What you – when you consider all this evidence, we are going to ask that this man, Doug, not be executed because of the mitigation that we are going to present. Thank you.

* * *

[1306] A Yes, sir. We'd want to speak to him. My kids weren't allowed to speak to him on the bus. Wasn't

allowed to ride the same bus – well, they rode the same bus but they couldn't get on at the same time.

Q Tell them about that? Where would the bus stop out there in front of the house?

A Well, the bus had to stop right in front of his yard then come down not too far at my yard and pick up my two girls up cause she didn't want them to be together.

Q Okay.

A And they got on the bus. And they weren't allowed to speak at all. If he did – if my girls say hi or something, the other kids would tell on him. When we saw him out in the yard, we would call him – we didn't want to start trouble or nothing – we'd wave at him, but we, you know, looked a lot at each other. And – it's been really sad and really hard to – to live like that.

Q Did you – did he ever visit you? Ever come over and visit y'all or try to?

A He wasn't allowed to get out of the fence. He wasn't allowed to get out in the road. He was like in prison.

* * *

[1325] A Well, I was out there beside of – walked around beside of a building. He was kind of around behind of a great big building. And so these little boys was out there –

Q You mean the two – his stepbrothers?

A Yeah, they're his stepbrothers.

Q Yeah.

A So they was out there and they was picking them up some of these old bad peaches on the ground. I seen a five-gallon bucket setting over there – over there on their [1326] side of the fence. And I said you boys reach me that bucket over here. I said, I'll get you some good peaches. So they reached me them good peaches – that bucket – it was a white five-gallon bucket. So I climbed up on the tree and I found the best peaches I could get for them, you know, and get a bucket practically full of what I thought the boys could carry. Set them on the fence – over the fence to them. And so the next morning I went back out there and well, the peaches were poured back over on my side of the fence.

* * *

[1383] Next slide. This is a closeup of Thelma Jean Buchanan. This was a photograph that Junior had. It was a newspaper photograph of the announcement of his mother's wedding. This picture was kept under his mattress, secretly hid away from his father and stepmother after his mother's death. As you heard this morning, much of Junior's early childhood rearing was in the responsible hands of his grandparents who live right next door to him.

Next slide. This shows coming out of the cemetery with the gates closed again. The point that I think that I would like to remind the jury of from a professional opinion [1384] standpoint is that the thing that was most disruptive to all of the major people in this series of crimes was death. Junior was only nine years of age when his mother died. Psychologically, it's a well-known fact that a child under ten years of age has great difficulty

dealing with death period – but specifically, dealing with the death of a mother.

Ordinarily, when people – when children lose a parent such as a mother, they can be helped during that time by the love and nurture and care of all the adults around them. It's quite analogous to a child being sexually abused. When a child is sexually abused, the effects of that on the child is determined almost entirely by the way the adults handle that tragedy. But in this particular case, in my professional opinion, no one was able to handle the death of this young woman, only thirty-one years of age at the time of her death.

Her parents handled it, in my professional opinion, that is the grandfather, whom I have interviewed and who has spoke here today, handled it with anger. His father handled it – I never interviewed him, of course – by replacement as soon as possible. Junior handled it by a term technically known as pathological grief. A refusal to grieve. He kept his mother alive by things that belonged to her. This is different from simply having sentimental memories of something. This is a substitute for the real live person.

[1385] I think you heard him testify that he kept rings and slept in the bed with rings that belonged to his mother. He kept this picture close to his bed. The picture – just go back one slide, if you would, Mr. Duval, to the picture of his mother again. He kept this picture, not as a remembrance of his mother because memory is poorly develop before age of ten. He kept it as his mother. He kept his mother alive.

It was not something that he could deal with. He was too young to deal with it. And all around him nobody else was able to deal with it. The real enemy in this particular case is death. No one knew how to deal with it.

And as you know – the next slide. The second slide after that one of you would. Just keep going. It was after his mother's death and then the second early marriage of his father, that these posted signs went up.

* * *

[1394] These crimes were preceded by less than twenty four hours by weekend of assault training with live ammunition, with guns and other things buzzing around him. He came home. While taking off – this was a rainy weekend – took off and was cleaning his clothes; looked up at the picture of his mother and his pregnant wife who was – had three months yet to bear her child – his child. And it's at that point he decided he could no longer tolerate what he'd been through. And that's what motivated him to go up and "try to straighten things out". It's my professional opinion, based on everything that I have reviewed, and my past training experience, that he was under extreme emotional stress at the time of these offenses.

Thank you.

Q Doctor, based on the question that I asked you before, all these reports and examination and all, do you [1395] have an opinion as to what his emotional age is?

A It's my professional opinion that his emotional age became convincingly stunted at about the time of his

mother's death. He is probably emotionally equivalent now to about a ten or eleven year old person.

Q And what would that do to a personality – his reaction to people and his personality to have a stunted age and be eighteen years of age?

A I thinks it makes him a very dependent person, easily influenced by other people. The major decisions in his life, he leaves to other people to make for him. I think it's especially worsened by the fact that he still has not accepted his mother's death, that he is still in the throes of pathological grief or denial of grief. And as I said, I think that it's basically the way he views himself and views the world, that is of a ten-year old child.

Q Do you think that he would be amenable to treatment and adjustment if he was given that option?

A I not only think that, but I have never seen in the twenty years of my experience that kind of a change in a short period of time. And let me remind the jury that I was not treating this young man. I had no doctor-patient relationship with him. I was simply evaluating him, asking him repeatedly to tell me about himself, about his background, about what he did. And to see that documented [1396] amount of change is a extremely encouraging thing with regard to favorable prognosis.

Q You are talking about the lowering of depression and the –

A And the improvement in his self-image. The human figure drawings.

* * *

[1436] Q Go ahead. Tell me what you thought about the –

A Well, I think as I've said he suffers from, in my opinion, the history of having been emotionally abused as a child, of being unable to accept his mother's death, and not being able to grow up emotionally beyond about ten years of age. He's a very compliant, dependent, cooperative kind of a fellow. He responds to leading questions by giving what he anticipates the questioner to want.

[1437] He has been involved in a tragic, emotionally upsetting series of circumstances and his memory is protecting him. Only bits and pieces come back. If he were a real psychopath trying to con me, he would have put forward many, many convincing things to me that would have changed my story about him – my understanding of him and his story. I think that the inconsistencies are attributable to his psychological immaturity and to his – the emotional stress that he's been under most of his life. He's always been in a tug-of-war between a longstanding family feud.

* * *

[1439] Q But it's your opinion that he – I want the psychiatrist's opinion. I'm not –

A All right. It's my opinion that he is a person who is very compliant and cooperative and is easily influenced.

Q All right, now, did he ever show any remorse when you were questioning him?

[1440] A Yes.

Q Tell he jury about that.

A First of all, I was impressed by the fact that I did not see any tears in the many hours that I spent with him. He seemed to have a fairly level of emotion throughout. He was, as I said, cooperative. But I didn't see ordinarily a full range of emotion. I've seen many people who cry over things like this. And many people who are angry. And I saw none of that.

When he was describing the death of his father, he said that after he shot him, he looked at him for about five minutes and that he felt a great deal of hurt and pain. And it seemed to me that I was witnessing he kind of emotional reaction that a person would have under these kind of circumstances, when he was describing it. That is, he was re-living some of that experience. He told me repeatedly how sorry he was and how remorseful he was over the deaths of his two brothers.

Q But he never cried?

A He did not cry in my presence. He told me that he cried many times in the jail.

* * *

[1444] Q What is the main points that you recall that substantiates your position of his mental state?

A That he was – that he – that he had been coping for ten years with the inability to accept the death of his mother. That the attempts on the part of his stepmother and father to wipe from his mind – to brainwash from his

mind – any traces of memories of his mother, had contributed to this [1445] pathological grief reaction. They had stunted his emotional development. He remains today as if he were a ten year old – emotionally developed ten year old who's trying to please and be compliant, but was caught up in the psychological warfare between the extended families –

* * *

[1445] A Well, that at the time of his marriage, instead of being liberated and becoming a separate fully functioning individual, he moved his new wife into his own home. There was not a separation or individuation, as we call it, at all. It was just bringing in and consolidating his dependency on his family. And that this did not get any better. That his family continued to want to control him even after he moved out of their house.

And that then when he had this military weekend, which I think influenced him, and came home and cleaning up [1446] his military uniform, looking once again at his mother. To him it was really, in fact, his mother. Not just a photograph of his mother, but his real – he kept his mother alive. He said he looks at his pregnant wife and says, my baby is not going to be raised this way. And at that time, I think, his mind became overwhelmed with the idea that he had to resolve this festering cancer of ten years.

Q Doctor, part of the statement indicates that he saw things. He was seeing objects that he –

A Yes.

Q – what is the – your opinion on that? What causes that? Is that a –

A He was under extreme emotional stress. As Mr. Meeks point outs – pointed out, in a time of heightened emotion, such as in a combat situation or anything that's emotionally upsetting, as in an automobile wreck or a tragic situation, sometimes the perceptions will be altered. I especially went at a close investigation of that because those are also the symptoms that a person has when they lose contact with reality.

If it had occurred to me, based on my studies of him, that he was no longer in touch with reality as a result of those kinds of symptoms, I would have voted for an insanity plea. But I felt that his mind was coming and going throughout this whole three or four hour episode. There may [1447] be moments in which he lost meaningful contact with reality, but it did not last long enough to cause him to be excused for his criminal design in my professional opinion. But it speaks to the severe emotional stress.

As I said in the last paragraph in my report – it wasn't that he lost contact with reality. He was embedded in the reality of a tragic past. It was that tragic past and that reality that caused him to go into this emotionally overwrought state.

* * *

[1506] Q Yeah. Okay. And y'all somewhat relied on Dr. Brown's report? I mean you didn't take his report. You [1507] relied on parts of it and drew your own conclusion from that report and from the other interview?

A We basically relied on some of the details he reflected and accepted them – his claims of talking with various people – and accepting, for example, the fact that there was no doubt it was a pathological relationship going on during childhood at this, you know.

* * *

[1574] THE COURT: Taking up the instructions for the record, the court has given instruction 1-P offered by the Commonwealth. Are there any objections to that instruction?

MR. EGGLESTON: No objection.

THE COURT: And then the court has given the instruction that has been numbered 2-P, which was offered by the defendant as defendant's instruction A-C, which I refused. I gave the first sentence of that instruction offered by the defendant and declined to give the second sentence. So 2-P embraces the first sentence of instruction A-C offered by the defendant. And objection?

MR. EGGLESTON: Your Honor, I object only to that portion that was refused. We believe that was an accurate statement of law.

THE COURT: All right. Now, we have the verdict form here on the two alternatives and counsel have copies of the verdict form. Are there any objections to the verdict form?

MR. MEEKS: No objection by the [1575] Commonwealth.

MR. EGGLESTON: No objection.

THE COURT: All right. All right. In taking up the other instructions offered by the defendant, several of them were on just one point, about singling out the – any mitigating factors in the instructions which is contrary to Virginia law according to the Supreme Court of Virginia. So the refusal of all of this group of instructions is on the same point.

Instruction A-B was refused on that point. Instruction – well – instruction – I'll group all of them together, Mr. Eggleston. A-B was refused on that point. A-G was refused on that point. A-H was refused on that same point. A-I was refused on the same point. A-J was refused on that same point. Now do you have any objections to the refusal of those instructions all on that general – same point?

MR. EGGLESTON: Yes, Your honor, I do. I'm familiar with the cases that talked about instructing on the mitigating factors. And we object to the refusal of these instructions on [1576] the ground that we believe it's proper to inform the jury of the factors that are set forth in the statute and that was our basis for offering these instructions was because that's the language from the statute. So we object and except.

THE COURT: Well, in at least two cases which have gone all the way to the Supreme Court of the United States, the law in Virginia is that it would be improper to give any of these instructions I just listed – that you – that I refused – A-B, A-E, A-G, A-H, A-I, and A-J.

* * *

[1577] THE COURT: All right. And then for the record, defense counsel confirmed that they withdrew instructions A-D, A-F, A-L, A-M, together with all the verdict forms which they submitted. All of them were withdrawn.

MR. EGGLESTON: Yes, Your Honor. That's correct.

* * *

[1579] THE COURT: Members of the jury, give me [1580] your attention for a short time. It's the duty of the court now to instruct you as to the law applicable in this phase of this proceeding.

You are instructed that you have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the defendant at death or if you believe from [1581] all the evidence that the death penalty

is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the defendant at life imprisonment.

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

* * *

You have a number of choices, and I'd [1582] like to talk for just a moment about the law so that you understand the state's view in this particular case.

Recall that you did Thursday night, you convicted the defendant of committing all four murders willfully and deliberately and with premeditation in one single transaction. That has already been resolved. So you do not have to go back into the jury room and talk about, was this intentional, was that intentional. You have already resolved all of those questions. And that's where we found ourself yesterday morning and that's where we find ourself this afternoon.

You – as the judge has said – you must decide whether the defendant in this case will be sentenced to death or to life imprisonment. The Commonwealth in this case is asking for the maximum penalty, which is death, and I will give you my reasons a little later.

You should know that in determining under Virginia law with whether a person is entitled to the maximum sentence, that the state only has to prove to you beyond a reasonable doubt certain things. We don't [1583] have to

not prove mitigation. We don't have to not prove what the defense evidence was. What we do have to prove to you is that with respect to the four victims, Douglas McArthur Buchanan, Sr., Donnie Buchanan, J. J. Buchanan, and Jerry – or Geraldine Buchanan, or any one of them – or any one of them – please read this very carefully – that the way in which they were murdered involved torture, depravity of mind or aggravated battery. And that can be torture to any one of them, depravity of mind to any one of them or aggravated battery to any one of them. You may even have a combination of those things.

Now understand when you deal with those variables, it would be quite human nature for twelve people maybe to see different things in different ones – in different factual scenarios concerning the murders of these four individuals. What you must return unanimously, if you come back with the decision, is the death sentence. But you may resolve the differences within the law instruction according to your personal observations of how the law – of how the [1584] murders actually occurred.

That's – and when we talk about torture, depravity of mind, and aggravated battery, those are the three sets of circumstances, individually, or each one of them individually, that describe under Virginia law what is meant by outrageously or wantonly vile, horrible and inhuman.

In fairness to the defendant, understand that even if you find that there was that vileness that you do not have to return the death sentence. I will not suggest that to you. You are entitled to impart your personal judgment

just as much as applying the law in deciding which punishment is fair.

It's a balancing test to a certain degree – a certain degree. On the one hand,

* * *

[1595] So, ladies and gentlemen of the jury, there can be no doubt, I suggest, that beyond a reasonable doubt, with respect to each of the murders, that the test of vileness has been demonstrated. But remember, you've only got to find it as to one.

But that's not the whole story. Then you've got to consider what you have heard the last day and a half – mitigation, history, the things about the defendant, many of which he told you in his statements. You had that information when you went in the jury room on Thursday night. But we have heard it expanded, more clearly defined. We have some agreement among professional psychologists and psychiatrists. We have some disagreement.

But what does it tell us? Let me refer to my notes. First, as I recall – and it really is hard to stretch back over a week and recall everything that everybody said and I'm glad that's your job and not mine. First, was [1596] the witness that I recall – I think there was a Mrs. Cheatham, then there was a Peggy Bolen that testified. Peggy is this boy's aunt, I believe, lives on – if this were the Buchanan house – lives over here on the left, if you are standing out in the road, with her husband, Anthony. And over here lives Linza Bolen.

Now Peggy tells you about the rotten things that happened to this kid when he was coming up. Our Psychologists in the statements say that – that he was kept in the yard. But did you catch the why? Did you catch the why? All through the first part of this trial with the evil parents doing this to this young man, do you remember the questions of the Judge to Peggy Bolen and to Audrey Bolen yesterday? Did you ever go and tell Doug that his wife was welcome in the family? And they both answered no.

What you have is what we have characterized, I suggest, is a feud between the two families. You had the unfortunate circumstance – and certainly you should consider it in this young man's favor – that his mother died at an early age. But the [1597] doctors agree that that alone is certainly not reason for someone to go and take the life of four people.

That happened. And Geraldine and Douglas got married. Everybody agrees on that. And everybody agrees that in about the first year, six months to a year, everything couldn't have been better. It was a nice home, happy neighborhood.

But then the falling out happened with the neighbors on either side, the relatives of the deceased's natural mother, Thelma G. Buchanan. And, I would suggest, what impacted on this young man was not just a product of his mother – or his stepmother and his father, but was a product also of relatives who were not willing to give in. Both sides share some of the blame for the anguish that he must have suffered as a young man. And I do not try

and take any of that anguish away from him. I do want you to consider it.

But you remember the words of Dr. Gwaltney. He says, yeah, I'll bet you there are a lot of people in Amherst County High School that have come from homes where there [1598] was distress of this type. But ladies and gentlemen of the jury, they don't go killing – and kill everybody in the family.

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Audrey also said that she went up there, and that Gerry and Doug and she tried to make peace. But I – if you recall, I asked her on the stand, I said – well, you really weren't interested in patching up with Geraldine or approving the marriage, you just wanted to see the boy? Yes. Well, I would suggest that Doug, Sr. and Geraldine,

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[1440] A Yes.

Q Tell he jury about that.

A First of all, I was impressed by the fact that I did not see any tears in the many hours that I spent with him. He seemed to have a fairly level of emotion throughout. He was, as I said, cooperative. But I didn't see ordinarily a full range of emotion. I've seen many people who cry over things like this. And many people who are angry. And I saw none of that.

When he was describing the death of his father, he said that after he shot him, he looked at him for about five minutes and that he felt a great deal of hurt and pain. And it seemed to me that I was witnessing he kind of emotional reaction that a person would have under these kind of circumstances, when he was describing it. That is, he was re-living some of that experience. He told me repeatedly how sorry he was and how remorseful he was over the deaths of his two brothers.

Q But he never cried?

A He did not cry in my presence. He told me that he cried many times in the jail.

* * *

[1444] Q What is the main points that you recall that substantiates your position of his mental state?

A That he was – that he – that he had been coping for ten years with the inability to accept the death of his mother. That the attempts on the part of his stepmother and father to wipe from his mind – to brainwash from his

mind – any traces of memories of his mother, had contributed to this [1445] pathological grief reaction. They had stunted his emotional development. He remains today as if he were a ten year old – emotionally developed ten year old who's trying to please and be compliant, but was caught up in the psychological warfare between the extended families –

* * *

[1445] A Well, that at the time of his marriage, instead of being liberated and becoming a separate fully functioning individual, he moved his new wife into his own home. There was not a separation or individuation, as we call it, at all. It was just bringing in and consolidating his dependency on his family. And that this did not get any better. That his family continued to want to control him even after he moved out of their house.

And that then when he had this military weekend, which I think influenced him, and came home and cleaning up [1446] his military uniform, looking once again at his mother. To him it was really, in fact, his mother. Not just a photograph of his mother, but his real – he kept his mother alive. He said he looks at his pregnant wife and says, my baby is not going to be raised this way. And at that time, I think, his mind became overwhelmed with the idea that he had to resolve this festering cancer of ten years.

Q Doctor, part of the statement indicates that he saw things. He was seeing objects that he –

A Yes.

Q – what is the – your opinion on that? What causes that? Is that a –

A He was under extreme emotional stress. As Mr. Meeks point outs – pointed out, in a time of heightened emotion, such as in a combat situation or anything that's emotionally upsetting, as in an automobile wreck or a tragic situation, sometimes the perceptions will be altered. I especially went at a close investigation of that because those are also the symptoms that a person has when they lose contact with reality.

If it had occurred to me, based on my studies of him, that he was no longer in touch with reality as a result of those kinds of symptoms, I would have voted for an insanity plea. But I felt that his mind was coming and going throughout this whole three or four hour episode. There may [1447] be moments in which he lost meaningful contact with reality, but it did not last long enough to cause him to be excused for his criminal design in my professional opinion. But it speaks to the severe emotional stress.

As I said in the last paragraph in my report – it wasn't that he lost contact with reality. He was embedded in the reality of a tragic past. It was that tragic past and that reality that caused him to go into this emotionally overwrought state.

* * *

[1506] Q Yeah. Okay. And y'all somewhat relied on Dr. Brown's report? I mean you didn't take his report. You [1507] relied on parts of it and drew your own conclusion from that report and from the other interview?

A We basically relied on some of the details he reflected and accepted them – his claims of talking with various people – and accepting, for example, the fact that there was no doubt it was a pathological relationship going on during childhood at this, you know.

* * *

[1574] THE COURT: Taking up the instructions for the record, the court has given instruction 1-P offered by the Commonwealth. Are there any objections to that instruction?

MR. EGGLESTON: No objection.

THE COURT: And then the court has given the instruction that has been numbered 2-P, which was offered by the defendant as defendant's instruction A-C, which I refused. I gave the first sentence of that instruction offered by the defendant and declined to give the second sentence. So 2-P embraces the first sentence of instruction A-C offered by the defendant. And objection?

MR. EGGLESTON: Your Honor, I object only to that portion that was refused. We believe that was an accurate statement of law.

THE COURT: All right. Now, we have the verdict form here on the two alternatives and counsel have copies of the verdict form. Are there any objections to the verdict form?

MR. MEEKS: No objection by the [1575] Commonwealth.

MR. EGGLESTON: No objection.

THE COURT: All right. All right. In taking up the other instructions offered by the defendant, several of them were on just one point, about singling out the – any mitigating factors in the instructions which is contrary to Virginia law according to the Supreme Court of Virginia. So the refusal of all of this group of instructions is on the same point.

Instruction A-B was refused on that point. Instruction – well – instruction – I'll group all of them together, Mr. Eggleston. A-B was refused on that point. A-G was refused on that point. A-H was refused on that same point. A-I was refused on the same point. A-J was refused on that same point. Now do you have any objections to the refusal of those instructions all on that general – same point?

MR. EGGLESTON: Yes, Your honor, I do. I'm familiar with the cases that talked about instructing on the mitigating factors. And we object to the refusal of these instructions on [1576] the ground that we believe it's proper to inform the jury of the factors that are set forth in the statute and that was our basis for offering these instructions was because that's the language from the statute. So we object and except.

THE COURT: Well, in at least two cases which have gone all the way to the Supreme Court of the United States, the law in Virginia is that it would be improper to give any of these instructions I just listed – that you – that I refused – A-B, A-E, A-G, A-H, A-I, and A-J.

* * *

[1577] THE COURT: All right. And then for the record, defense counsel confirmed that they withdrew instructions A-D, A-F, A-L, A-M, together with all the verdict forms which they submitted. All of them were withdrawn.

MR. EGGLESTON: Yes, Your Honor. That's correct.

* * *

[1579] THE COURT: Members of the jury, give me [1580] your attention for a short time. It's the duty of the court now to instruct you as to the law applicable in this phase of this proceeding.

You are instructed that you have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the defendant at death or if you believe from [1581] all the evidence that the death penalty

is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the defendant at life imprisonment.

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

* * *

You have a number of choices, and I'd [1582] like to talk for just a moment about the law so that you understand the state's view in this particular case.

Recall that you did Thursday night, you convicted the defendant of committing all four murders willfully and deliberately and with premeditation in one single transaction. That has already been resolved. So you do not have to go back into the jury room and talk about, was this intentional, was that intentional. You have already resolved all of those questions. And that's where we found ourself yesterday morning-and that's where we find ourself this afternoon.

You – as the judge has said – you must decide whether the defendant in this case will be sentenced to death or to life imprisonment. The Commonwealth in this case is asking for the maximum penalty, which is death, and I will give you my reasons a little later.

You should know that in determining under Virginia law with whether a person is entitled to the maximum sentence, that the state only has to prove to you beyond a reasonable doubt certain things. We don't [1583] have to

not prove mitigation. We don't have to not prove what the defense evidence was. What we do have to prove to you is that with respect to the four victims, Douglas McArthur Buchanan, Sr., Donnie Buchanan, J. J. Buchanan, and Jerry – or Geraldine Buchanan, or any one of them – or any one of them – please read this very carefully – that the way in which they were murdered involved torture, depravity of mind or aggravated battery. And that can be torture to any one of them, depravity of mind to any one of them or aggravated battery to any one of them. You may even have a combination of those things.

Now understand when you deal with those variables, it would be quite human nature for twelve people maybe to see different things in different ones – in different factual scenarios concerning the murders of these four individuals. What you must return unanimously, if you come back with the decision, is the death sentence. But you may resolve the differences within the law instruction according to your personal observations of how the law – of how the [1584] murders actually occurred.

That's – and when we talk about torture, depravity of mind, and aggravated battery, those are the three sets of circumstances, individually, or each one of them individually, that describe under Virginia law what is meant by outrageously or wantonly vile, horrible and inhuman.

In fairness to the defendant, understand that even if you find that there was that vileness that you do not have to return the death sentence. I will not suggest that to you. You are entitled to impart your personal judgment

just as much as applying the law in deciding which punishment is fair.

It's a balancing test to a certain degree – a certain degree. On the one hand,

* * *

[1595] So, ladies and gentlemen of the jury, there can be no doubt, I suggest, that beyond a reasonable doubt, with respect to each of the murders, that the test of vileness has been demonstrated. But remember, you've only got to find it as to one.

But that's not the whole story. Then you've got to consider what you have heard the last day and a half – mitigation, history, the things about the defendant, many of which he told you in his statements. You had that information when you went in the jury room on Thursday night. But we have heard it expanded, more clearly defined. We have some agreement among professional psychologists and psychiatrists. We have some disagreement.

But what does it tell us? Let me refer to my notes. First, as I recall – and it really is hard to stretch back over a week and recall everything that everybody said and I'm glad that's your job and not mine. First, was [1596] the witness that I recall – I think there was a Mrs. Cheatham, then there was a Peggy Bolen that testified. Peggy is this boy's aunt, I believe, lives on – if this were the Buchanan house – lives over here on the left, if you are standing out in the road, with her husband, Anthony. And over here lives Linza Bolen.

Now Peggy tells you about the rotten things that happened to this kid when he was coming up. Our Psychologists in the statements say that – that he was kept in the yard. But did you catch the why? Did you catch the why? All through the first part of this trial with the evil parents doing this to this young man, do you remember the questions of the Judge to Peggy Bolen and to Audrey Bolen yesterday? Did you ever go and tell Doug that his wife was welcome in the family? And they both answered no.

What you have is what we have characterized, I suggest, is a feud between the two families. You had the unfortunate circumstance – and certainly you should consider it in this young man's favor – that his mother died at an early age. But the [1597] doctors agree that that alone is certainly not reason for someone to go and take the life of four people.

That happened. And Geraldine and Douglas got married. Everybody agrees on that. And everybody agrees that in about the first year, six months to a year, everything couldn't have been better. It was a nice home, happy neighborhood.

But then the falling out happened with the neighbors on either side, the relatives of the deceased's natural mother, Thelma G. Buchanan. And, I would suggest, what impacted on this young man was not just a product of his mother – or his stepmother and his father, but was a product also of relatives who were not willing to give in. Both sides share some of the blame for the anguish that he must have suffered as a young man. And I do not try

and take any of that anguish away from him. I do want you to consider it.

But you remember the words of Dr. Gwaltney. He says, yeah, I'll bet you there are a lot of people in Amherst County High School that have come from homes where there [1598] was distress of this type. But ladies and gentlemen of the jury, they don't go killing – and kill everybody in the family.

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Audrey also said that she went up there, and that Gerry and Doug and she tried to make peace. But I – if you recall, I asked her on the stand, I said – well, you really weren't interested in patching up with Geraldine or approving the marriage, you just wanted to see the boy? Yes. Well, I would suggest that Doug, Sr. and Geraldine,

who we've had to characterize even though they're dead and gone, were there and they may have very well have sensed, yeah, you just ınt to come and see the boy, you're really not interested in [1601] the fact that we are married and have a home and we're trying to put our family together.

Then you have Mr. Linza Bolen. An absolutely delightful gentleman. I think – I think it was really quite moving to see him come into the courtroom. Linza told about the disagreements in the family. He told of one incident where he went over and I believe the way he put it – I think he put it right at the end of his testimony – he said that Peggy and Anthony were fussing with Geraldine and Douglas, and they were all out there at the fence, and he went out there and threatened to whip them all if they didn't behave themselves. And I suspect he might have tried it if they hadn't behaved themselves.

One thing that's interesting, I think, in listening to Linza's testimony and listening to Audrey's testimony and listening to Peggy's testimony. You remember the defendant testified that my parents would get out there and they'd all get guns and waive them at each other. Remember that. That was back a few days now. Remember, he said they'd go out in the back yards and they'd fight with the [1602] relatives and would waive [sic] guns. Did you hear any of those three people mention anything about guns? I think they asked Mr. Linza Bolen – They said, did you ever see Doug, Sr. and Geraldine fight out in the back yard. He said, no, never did. So you – again, you have the defendant trying to exaggerate what went on in that home.

Then you have Reverend Campbell. And I think I've probably already in passing mentioned his testimony. He said, yes, it was a troubled home, but says the boys came to church – all three of them. He said their parents took them. I think that's what parents are supposed to do. If they don't go themselves, they certainly should take their children.

Then you hear Dr. Brown. Dr. Brown is a man with extremely impressive credentials, as are Drs. Lee and Gwaltney – men of tremendous experience. Doctors – and – and the doctors agree on a number of things and they disagree on a few things. But Dr. Brown said that he talked to the defendant for twenty and a half hours. He must have told you that five [1603] or six times. And Dr. Brown never heard anything about a suicide. He never heard anything about intentionally cutting Geraldine's throat. He didn't hear a lot of things. I suggest – I do not suggest that Dr. Brown would come in and fabricate any of his testimony. I will not suggest that to you. I suggest he didn't get accurate information from the defendant.

I also would recall to you what Dr. Brown said, that if he got inaccurate information, it could invalidate the parts – some of the conclusions that he drew. And I think you are entitled to consider that. If he got bad information – if he didn't find out what you have already found out, how could he possibly give you the evaluation that he did? The other thing about Dr. Brown's testimony – I don't want to spend too – too long a period of time on it. We had a lot of scientific testimony. And I think what you – in reviewing it you should try and get not only the individual details of the testimony, but a flavor for what it is these doctors are talking about.

[1604] You recall, Dr. Brown and I entered into a question and answer session. And Dr. Brown said that the defendant in this particular case was easily suggest – easily led. Easily led. Dr. Lee disagreed and Dr. Gwaltney disagreed.

Do you remember why Drs. Lee and Gwaltney disagreed? Officer Doss of our Sheriff's Department, interviewed the defendant repeatedly for hours on end in the days right after this homicide – on and on and on. Were you even in the Naola area? No. Do you know anything about the killings? No. Is this – are these the answers of somebody that's easily led? In Albuquerque they go in to interview him. Read it. It's in the transcript. That portion's there. Doug, we are here – you know what we are here to talk to you about? Yeah. You did it, didn't you? No. It's that simple. That's easily led?

He did not even admit participation in these events until they took a tape recording of his wife, brought it – put it down in front of him, and said now, will you tell us you did it? And he said, yes. You mean to tell me [1605] that somebody who is easily led, resisted giving one single detail for almost a month and a half, and with repeated questioning by the law enforcement authorities of this county and of the regional homicide squad? I hope that doesn't wash with you.

Now, I do hope, however, that you recall the two other professionals who say that they have reviewed all of the same evidence you have seen, plus the additional interviews, plus Dr. Brown's material, and they did not find him easily led. Another thing about Dr. Brown's report – and there are a number of things that I am sure

Mr. Poindexter will point out to you about it – but if you recall, Dr. Brown testified, as did Drs. Lee and Gwaltney, that this defendant has an exceptionally or a – certainly better than average IQ. If I recall the number – I don't see it here – it's in the hundred and nineteen – hundred and twenty-one range. And we're not talking about somebody of weak mind that can't understand what's going on and can't resist what was happening to him.

But there was a test called the [1606] Minnesota Multiphasic Inventory. You remember the slides, and they put up the graph, and they showed how many points up it was above and how many points down below. And then you Had Dr. Lee and he had his test. And he went over the results. And Dr. Lee – he said that Dr. Gwaltney – I mean that Dr. Brown and he agreed with the test results.

Now, Dr. Lee gave an interpretation that is consistent with what I'm about to address to you. Dr. Brown looked at the same results and said these – this is the analysis of a computer – an unbiased machine. Machines don't think. They just do whatever they do. This is the analysis that came out. He just happened to disagree with it. He says in looking at the MMPI that the defendant's responses to this test indicated that he is immature, compulsive and hedonistic – the means pleasure-seeking, does whatever he wants to do, and that he frequently rebels against authority. He is hostile, quite aggressive, and often frustrated. He seems to be unable to learn from punishing experiences. That's what he testified – he agreed that that [1607] was what the test said. And repeatedly gets into the same types of problems. That's the man you are asked to give a fair sentencing.

Many individuals with this profile develop severely addictive problems and frequently have legal, family, and work difficulties. And catch this? You saw the defendant testify from the stand. We – I saw – I saw, and I hope you saw, no emotion whatsoever. The doctor explained it to a certain degree. But here's what his test says. He may appear charming and intends to make a good first impression, but he is superficial, selfish, hedonistic and untrustworthy in interpersonal relations. That's what the test showed. In addition, he is likely to be openly hostile and resentful.

I think you saw a pretty good example of that, or I hope you find that you saw a pretty good example of that, on the afternoon of September 15th. Openly hostile and resentful is, I suggest, a pretty good way of describing him. He says – the doctor says he feels like he is rehabilitable – whatever that means. You have heard Dr. Gwaltney ask basically he said, [1608] well, what do you mean "rehabilitable". He doesn't have a personality disorder. What is it you are trying to rehabilitate? Yes – any – I suppose anybody who has a few – who has hangups or problems can benefit from psychotherapy, but that Drs. Gweltney and Lee – a mouthful – Drs. Gwaltney and Lee certainly don't suggest that he has any illness, nor does Dr. Brown, really.

But the MMPI says this about rehabilitation. It says – it says his MMPI profile is a highly persistent one suggesting a long history of personality problems that are not likely to change significantly. You should keep that very much in mind.

Then after Dr. Brown completed his testimony, if you ladies and gentlemen will recall, I called a series of witnesses to the stand. I'd just like to briefly review their testimony. I apologize in advance for the length of my argument because there is just so much material we have listened to in the last five weeks – five days, I'm sorry.

I do want to remark a couple of other [1609] things about Dr. Brown's testimony. Dr. Brown gave a presentation – very impressive – in fact, he told you it was done by a professional photographer. He told us what his sons did for a living and he showed us eight or ten slides of the fence. Well, y'all saw the fence. It's there. I'm not trying to take down a fence. The fence is there and it's got no trespassing signs on it. He and his professional photographer had Linza stand in the gateway and look over across the fence. He and his professional photographer had the peach bucket there. We've never denied those things occurred. But unlike the slide presentation was geared to do, you should keep them in balance.

Yes, he showed us four or five distance views and got closer and closer to Thelma Jean's grave had showed us her picture at least three times. But I ask you not with your mind to bring those things out of focus, but to treat them along with all of the other evidence. We showed you a lot of slides, too. It's not a battle of slides, ladies and gentlemen. The slides and the information was [1610] brought to you because we had almost two hundred exhibits, and there was just no other logical way to bring all of these bullets and the gun, pieces of rug and glass that was laying on the floor, and the book bag. The easiest way in the world to bring those to you was to bring them

to you by pictures. Certainly, we didn't take a professional photographer out there. We took a forensic man from the Lynchburg Police Department, who tried to give you the best pictures he could.

But you remember Dr. Brown – getting back to where I was – remember Dr. Brown, after he gave his testimony, was cross-examined. And I asked him a series of questions. And he acknowledged that Douglas was a gifted child. He had a 121 IQ. And he acknowledged that the act of wearing gloves would be consistent with a person who was carrying out a plan. He agreed that a person who dragged bodies off in sequence so the next victim or series of victims wouldn't see it would be consistent with someone carrying out a plan. He agreed that putting the gun against the head of your victim and pulling the trigger in execution [1611] style would be consistent with someone carrying out a plan. He agreed that someone parking their vehicle in an area remote from the scene of the crime would be consistent with someone carrying out a plan.

And though he wanted to argue about the meanings of the statements to the police about Douglas and his wife, Christianne, planning this on Monday and going to the area prepared to commit the offense and then aborting it and going to the area on the parkway on Tuesday, those facts are there. Those facts are there. Read them in the transcript. The doctor can argue all he wants about what they mean, but they are there. Dr. Lee and Dr. Gwaltney had no problem with taking the facts as they are and they've had the benefit not only of all the things you've had, they also had the benefit of all of Dr. Brown's research.

Then as I had mentioned to you, I called a series of witnesses. They give you little bits and snapshots of what happened in Douglas's life. You are to consider and to weigh and to try and draw these things that have happened into perspective.

[1612] I called back Ann Campbell, who was our first witness in this case. Remember her? She – Reverend Campbell's daughter-in-law. She worked at the nursery. She was a classmate of Geraldine in college. She had known Geraldine for a number of years. She – she said yes, she said she knew that there had been some problems in the Buchanan family. And then she said what I think is one – or I hope you will find is one of the most chilling things that has happen – that was said in this trial. She said, you know, it was just the last afternoon that I saw her. We were talking and she said, you know, I made some mistakes early on with Douglas. But we have put those aside. Things are good now. Less than forty-eight hours later, he darn near cut her head off.

Then remember the testimony of Lee Denton. You remember Lee Denton. He was the young man who came in and had on the loose waisted white shirt. I would trust you could see he was very nervous – he didn't want to be here. He characterized himself as this defendant's best friend. I suggest it probably was no fun for him to come into a [1613] trial like this and have to testify about his best friend.

They had known each other since, if I recall, junior high school, and he started going to his house late in the defendant's high school career. Of course, he could not

have any personal knowledge of the things that happened when Douglas, Jr. was growing up, but he characterized that the household was one that the people got along. He characterized it as a normal household.

He was asked to compare who got along better with the defendant, Douglas, Sr. or the mother. He said well mom – his mom did. He said she was really neat. In fact, she used to scold the two of us when we'd go out. Said don't get into any trouble. Nothing unusual there. But another snapshot of what went on in the Buchanan household in the last couple of years.

Then you remember Ben Harrison. You remember Dr. Gwaltney – Dr. Brown's testimony? Dr. Brown brought out that just before this happened the defendant had been to National Guard training and had been near a live fire [1614] course. Remember how Ben Harrison, the young Liberty student, characterized that? He's the assistant mortar man to this fellow. He said, yeah, we were there. There one day. No, we didn't participate in the live fire. And I said, well is this live fire like where you get down on the ground. You have all seen these training flicks on the television where they get up under the barbed wire and the machine guns and shoot. No – no – no – They were just firing some live rounds. Well, where were you? Well, we were about a hundred and fifty feet away, and we had on ear plugs, and we were handing out ammunition. I guess Dr. Brown just wanted to mention that to you. I don't know why he would find it significant, and I hope you don't either.

Then we brought in for you to consider, Johnny Patterson. Johnny is – lives out in Richlands, Virginia. And

Johnny was this young man's uncle, I believe – was Geraldine's brother. And he admitted that Geraldine perceived that her husband had a drinking problem. He said that he would visit them several times a year. Said they seemed like a [1615] normal, happy family to him.

Said one thing he was for sure that he never – he never saw any mistreatment of the children. Another snapshot taking in bits and pieces of time I believe he said over he last seven years – or last several years – to show you that this was not some hell hole for this young man to have been living in that drove him to do what he did. He lived in a home that had some problems, but certainly does not excuse the systematic execution of four people.

Finally, before we called the doctors to the stand we put on Patsy Crouse, who is Doug, Sr.'s sister. Patsy said yes, there's some families in the problem. Said yes, Doug, Sr. drank quite a bit. He had a drinking problem – and it bothered Geraldine I believe she – I believe she stated that when Mr. Poindexter asked her some questions. She said he was a loving father. Said that Geraldine and he were both very concerned that all three children would be treated the same. These certainly are not portraits or the snapshots of monsters who deserved to be executed on *United States v. Moses*, 106 F. 3d 1273 (6th Cir. 1997) (reversing upward departure to lengthen sentence of dangerous defendant); [1616] September 15th.

And so, ladies and gentlemen, the question comes down after you look at all of this evidence and I hope the answer is obvious to you. After you look at Dr. Lee's testimony and what he – I'll just throw this at you – here

were the results that he testified to from his MMPI. He's testified to you that Mr. Buchanan's responses of the self-reporting personality inventory showed that he was self-centered, impulsive and exploitive and said people of this type are self-indulgent, lack planning or foresight, and often find themselves in financial, legal and interpersonal difficulties. It sounds very much like Dr. Brown's report, doesn't it? He goes further. He says such a result suggests a lack of remorse and concern over what happened. Self-centered, hedonistic and indifferent to the needs and feelings of others. Sounds like Dr. Brown's report.

Finally, this morning you had Dr. Gwaltney. Dr. Gwaltney testified to you in perhaps a little different format from that that you heard from the other two doctors. He [1617] talked about the three things that were required – he was required by the court to find. He had – he said – let's deal with the first one, was mitigating circumstances – and he admits, as does the Commonwealth, that there were some crummy things that happened to this young man in his home life. Then he was asked to deal with whether, at the time of the event, he was under extreme emotional – under the control of extreme emotional factors. He said the facts just don't bear it out.

He's a forensic psychologist. He's been doing this thing since 1968 – or '58, if I recall his testimony. He's worked for the Department of Justice. Just as Dr. Brown's credentials are very impressive as well. But how about what Dr. Lee told you. Is Dr. Lee somebody – I mean Dr. Gwaltney, is he somebody that's an employee of the state to come up and help out the Commonwealth Attorney when he's trying a case? Dr. Gwaltney says that he has

testified in a number of capital trials. This is first time he has ever testified for the Commonwealth. In every other instance, he has testified for the defense. That ought to [1618] tell you something. That ought to tell you something about his testimony.

* * *

[1620] Ladies and gentlemen of the jury, I've got to explain to you why I feel you should return the maximum penalty in this case. I know that deep down in some of your hearts, there is a reserve. I trust that all of you have had human compassion and decency. I hope you will find that Mr. Poindexter and I have those same characteristics. But that's not what this case is about.

This case is about three things, as I see it – and I hope you review that – one is duty, one is expression to the public for what the standard of justice is that comes in this courtroom, and the third one is that the [1621] defendant has put himself where he is today. He has forfeited his rights.

* * *

[1624] Now, there is something in the law that's called mitigation. Now mitigation – that doesn't mean that he is – that doesn't mean that he's making an excuse. Mitigation is not excuse. There's no excuse for what he did. But there – the law in its wisdom has given a jury and the court – if it's in the breast of the court – a way to weigh all the facets of a man's background, and the facets of any [1625] pressure that he happened to be under at the time that the act that he's charged with occurred. And if they think, in their wisdom, that there is some factor

that has redeeming value or there is some factor that means that he has some, not excuse – but some reason not to get the death penalty, then you have a right to take that into consideration and give him life in prison.

Now, the court – the jury – I keep saying the court, but the court and the jury can consider almost anything. There are certain facts that are set down in the statute, but practically any factor can be considered in mitigation.

Now, one of the factors, for example, is youth. That's set in the code. Youth is one of the factors that you can take in consideration. It doesn't say emotional age. Although Dr. Brown says that his emotional age is ten years of age. But his actual chronological age was nineteen at the time that he did this. That's youth. And you can take his youth in consideration.

Now, it doesn't say that you take his [1626] youth in consideration because he might have an opportunity to be rehabilitated. It doesn't say that. But that is a factor. I mean he's nineteen years of age and these psychiatrists and psychologists here said that he might be amendable to rehabilitation. So that is – that's one factor you take in consideration when you come to your decision – not whether he's guilty; God knows he's guilty and I'm not saying he's not – but when you decide whether you're going to electrocute him or not.

Now, the other things that you can take in consideration, and I'm going to read them because I don't want to mislead you in any way. And we're trying not to do that. We've tried to be honest with you in this case. The others

– he had no criminal record. Does the man have a criminal record? Now Doug Buchanan has no criminal record. None was –

MR. MEEKS: Your Honor, I've got to object to that. There was no evidence either way – either way –

MR. POINDEXTER: And that's why I can –

MR. MEEKS: – before the court.

MR. POINDEXTER: – that's a negative. And I can introduce that.

THE COURT: The objection is overruled. Go ahead.

MR. POINDEXTER: That's a negative. Mr. Meeks – do you think that Mr. Meeks wouldn't have – wouldn't have introduced a criminal record if he had a criminal record? He hadn't got any criminal record, because that was one of the elements for what Mr. Meeks is trying to prove when he asked for the death penalty. He has no criminal record. None whatsoever. Not any.

All right. As I said, there are all sorts of facts you can take into consideration. But I'm going to read to you three others. We call your attention to three others. One of them – the second one that I would like to call your attention to – is that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Let's take that one next. Now, these doctors got on the stand. And you know psychology and psychiatry is not a fixed or certain science. They can – [1628] with their knowledge and all these doctors had vast knowledge, had talked. They were good – mine was good. Dr. Brown was good. The other

two were good. I don't suggest that they were not. But they all got on the stand and all said that he had a turbulent childhood – a terrible childhood. All their disagreement was is how it affected him, how bad that effect was on him.

I suggest to the jury that that had a terrible effect on him. And for anybody to submit to this jury that it didn't have a terrible effect on him when all three of the doctors say so, when his parents say – and what is the worse effect it had on him? Well, Linza Bolen came in here, and Linza Bolen was his grandfather, and Linza Bolen had been bonded with him since he was two years of age until he was nine or ten when his mother died. And they took that child away from Linza.

You'll have to excuse me. Sam and I have been living with this case. They took him away from Linza. Now why? Why did they do that? Do you think they did that because Linza was arguing with them? There's no [1629] evidence that Linza ever argued with them. He never – there's not a smidgen of evidence. It was his – the children – the children were always fighting. They were fighting each other. But Linza – that old man – there's no evidence that they ever had a argument. And I suggest to you that was traumatic for this child. Traumatic. He never has recovered from that.

So, I won't go into all the other evidence. You've heard it. You saw the fences, didn't you? The fences around his house. He was fenced in like a dog. There is no question there – and that's why Dr. Brown had all these pictures. That's why he had these pictures here and showed them to you.

Not only was he fenced in, but his mother was fenced in. He took with him a picture of his mother all the time. And Dr. Brown – the psychiatrists don't agree why he did that. Dr. Brown said his mother was alive. That was his mother. He kept her with him. He kept his mother – he kept the mother's jewelry. Kept the mother's jewelry until they took it away from him. You know what a security [1630] blanket is? You got kids? That was his security blanket. But it was more than a security blanket. It was actually his mother. Actually his mother. I suggest to you that that's a terrible, terrible psychological position for the child to be in.

Not only that. There's been testimony here of how well they got on. How nice they were to each other. But that was just only part of the time. The rest of the time they weren't nice to each other. They were arguing, fighting, I don't – I'm not going to argue with Mr. Meeks as to who had the gun. I don't think that's important. We know from the evidence that they – who – I mean who was fighting with Doug and who was fighting with each other. We know from the overwhelming evidence that they were doing that. We know it. I mean, can it be doubt in the jury's mind? There's none in my mind from hearing the evidence from this stand. They fought all the time. They – and we're not trying to demean anybody. That's not our purpose.

They had a problem with drinking. I mean there's no question about it. They had a [1631] problem with drinking. He lived though that. He was caught between all that fighting.

Now, what did that do to him? Well, what would it do to anybody? Suppose if we were at work and one day our boss – and, you know, when you're nine years old your parents are – and your step-parents are your boss. They tell you what to do. And one day you come in and your boss would say – well, you know you are the smartest fellow. You're the best lawyer I've ever seen. You're just wonderful. Come tonight and have supper with me. And you'd say, well isn't that wonderful. I'm accepted. I'm a good lawyer. I'm going to make partner. Sam, going to make partner in the firm. And the next day you came in and he said, you S.O.B., you are the dumbest guy I've ever seen in my life. I may fire you next week. Well, that's what Doug lived through. All his life.

One day they were nice to him and the next day they were getting ready to fire him, to get rid of him, to lock him in his room. That's like on a roller coaster. Ummm-mmmmm. One – and that's worse. You know, if they hadn't done that – if they hadn't done that to [1632] him, he – this crime would never had happened. You know why? Because he would have never wanted to go back there. He would have never wanted to go back inside that fence again if they'd done that. He would have hated them. But he had a terrible hate/love relationship. A terrible hate/love relationship. He wanted to be with them. And yet, when he was with them, sometimes they were nice to him and sometimes they rejected him.

So I suggest to you that the emotional disturbance, mental and emotional disturbance – and what this jury has got to decide is whether that was enough to mitigate this terrible, terrible crime. And that is going to have to

be your decision. Was that enough for him to do what he did?

The Commonwealth has tried to say that he had no remorse. Well, what is remorse? I mean, what would remorse do – how would somebody be remorseful if they'd had to hide their feelings? You know, when you – if my boss – if my boss when I go to work one day is nice to me and the next day ain't so nice to me, then I'm going to withdraw in myself. And [1633] I'm going to be careful what I say to him when I come into the office. And finally, it will – and that's – that's not even a smidgen – not even a smidgen to what it is when you have – when you have a parent – a dependant [sic] child – a nine-year old boy. You are going to withdraw into yourself. And finally you stay in yourself. You stay in yourself. Now why should you go out and say, Geraldine, I love you, when you don't know what's going to happen? You're very, very careful of what emotions you show and what you don't show.

And I suggest to you that that is what has happened to him. He has a hard time expressing himself to his lawyers, to the psychiatrists, to the jury. He can't cry. He – well, I shouldn't be testifying. I don't – I don't know that; but, it seems to me, looking at him, he can't get it out. He can't get it out of himself.

Now, I want to acknowledge this jury's anger. I know you're mad. I don't blame you for being mad. When I read the thing, I was mad, too, and I represent him. But a decision of whether he should go to the electric chair [1634] shouldn't be made because you are mad. That's not

what it is made on. It's made on whether there is mitigating circumstances. Not excuse, but mitigating circumstances. That's what it is made on. Not anger.

Life in this country is precious, and whenever you see something like this, it makes you mad. And I understand that. I know. I can understand that perfectly. It comes from the preciousness of life, is what it comes from. I have so much to say, and I don't want to bore you. I just don't know how to start.

But I'm going to go – I'm going to another one of the requirements. At the time of the commission of the capital felony – the felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. Now, I submit to the jury that it was.

And to prove that, I'm going to read you parts of the first statement he gave. I want

* * *

[1639] Does that show that he was vicious? He was talking about his brother. That showed he was vicious? Why did he do that? There can be only one explanation. And I'll read you some – could be only one explanation. He was under a strong emotional influence. Strong. There's no other explanation.

* * *

[1644] And it goes on and on. There are other things. Like the two pauses – indications. Indication to this jury that he was under great emotional distress. Now, I don't know what great emotional distress is. And that's up to the jury to decide that. I'm not going to tell this jury that I

think he was under such great emotion stress that it's one of the mitigating factors. I do think that his childhood – I go on record saying that his childhood – we think that that is a mitigating circumstance. Now, how much it affected him the doctors disagree. That's up for the jury to decide. As I told you, psychiatry is an imperfect – imperfect science. So that's up to you to decide.

* * *

[1645] him. I suggest to you that this case is a case which this jury has the mitigating circumstances to give him the death penalty. There's no question – there's no – it's there, but you – it's your decision. Now, not to give him the death penalty I meant to say. Not to give him – I'm worried about the death penalty. I don't want you to kill this boy because I think – I think the evidence shows that he can be helped. I think the doctors said that. He can be helped. And he's young enough and he's led a lousy childhood. And for us to kill him is – is – well –

You know death is the absolute punishment. Absolute. That's the absolute punishment you can give somebody – that I – that we have. But it's not proper in a case when a person is not absolutely responsible. Have you ever thought about that? It's the absolute punishment. But is death in the electric chair proper for somebody who is not [1646] absolutely responsible? And do you think that Doug Buchanan was absolutely responsible? Does this evidence show you that he was not absolutely responsible? Death is not – it's the absolute punishment. And it's not the proper punishment for a person who's not absolutely responsible and absolutely responsible for what he did.

* * *

[1647] I want to tell you something. The existence of a single mitigating circumstance – if you don't believe but there is one mitigating circumstance, you can find that this boy – this boy should have a life sentence. That's all you have to have. The Commonwealth – if you [1648] will notice that the Commonwealth – if you can believe that this mitigation is enough to spare his life, you can do it. The Commonwealth has to prove all of their things in the instruction that all this was heinous and all, but if you believe that Doug had one mitigating thing, you can – you can spare his life.

* * *

[1649] you don't know about the case. And you – if they come to you and say why didn't you kill him, I read in the paper about all that stuff, you can tell them you did not hear the evidence. I heard the evidence. You don't know what you are talking about. There was mitigation.

* * *

[1650] And I don't want you to be misdirected or misled about this concept of mitigation. Mitigation is a balancing proposition. It is not a directory type of proposition. If the only question was is there mitigation, we could have stopped back on Thursday night. [1651] Even Dr. Lee and Dr. Gwaltney says yes, there is some mitigating circumstances. So don't be misled. This is not a proposition that if you find that there is some mitigation in it, that he had a crummy childhood, that he had parents who were not the best of parents, that he had a family situation that was not the best of family situations, that

doesn't mean you have to come back in here with less than the maximum penalty. You've got to balance it. You've got to balance it.

And I suggest just a simple proposition of logic to you. As the body count goes up, does the mitigation have to go up? There's nothing in the law on that. That is a simple proposition of logic. How high do you have to stack the bodies and how high does the mitigation have to rise?

* * *

[1652] Now, Mr. Poindexter attacks the statements and he says that they showed that he was under extreme emotional disturbance or distress and that's a mitigating circumstance. Remember Dr. Gwaltney's testimony this morning? Dr. Gwaltney says that there are relevant factors in mitigation concerning his history and character that the trier of fact – that's you folks – may find relative at sentencing issues. But he goes on to say there is no indication that at the time of the offenses, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

* * *

[1653] Dr. Gwaltney also says he also did not appear to have acted under extreme mental or emotional disturbance at the time of the offense. Does that mean that Dr. Gwaltney and Dr. Lee say no, he wasn't hyped up? No, that's not what they said at all. Dr. Gwaltney said he naturally reports varying degrees in emotional arousal

under the relevant time – during the relevant time. However, he was not acting under extreme mental or emotional disturbance. His behavior appears to have been based on reasoning that led to purposeful goal directed behavior to achieve its end. Those are some very complicated concepts of words. What does it all mean?

You remember Dr. Brown's testimony yesterday, the psychologist and the psychiatrists that were working with him? He [1654] used the same language. Maybe some of you understand psychological jargon. But I asked him a simple question. I said when you are describing what was going – the state he was in when this was going on, I said, are you familiar what it's like when a troop is ordered into combat, going to a killing situation? Is it like that? He said, yes. That's what it's like.

Well, I am not going to sit here and argue to you that Douglas McArthur Buchanan, Jr. wasn't hyped up, wasn't emotionally aroused when he was about the act of killing someone. That would make him – even could make the situation even worse than it is. How could anybody – even someone who has killed four persons – go in and kill four people and not have some emotional response? That would be totally absurd.

But does that mitigate it? Does because you get hyped up because you are doing something wrong, does that excuse it? That's what they are suggesting.

* * *

[1656] Ladies and gentlemen, one thing that probably Mr. Poindexter and I agree about is this, and that is, that what you have to do, you have to balance. If you believe the crime was vile, I am not going to sit here and [1657] suggest to you that you must bring back a sentence of death. That is not the law. You are entitled to follow your own caprice. You are entitled to consider all of the facts, the history, the mitigating circumstances, and all of those things. But what I do suggest to you is this. I suggest again that you must bring back a sentence of death in this case because it is the only – it is the only reasonable sentence that can be given for acts such as this.

* * *

[1658] Listen down where you know what is right. Tell me, which of these makes more sense? Are you going to walk back into this courtroom and are you going to say, we the jury on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan as a part of the same transaction, and having found unanimously that his conduct in committing the murders of the four victims, or any of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the four victims, or to any one of them, and having considered the evidence in mitigation of the offense, are you going to come back and say, we fix his punishment at life imprisonment? And that is less than the [1659] maximum.

I do not try to appeal to your emotions whatsoever. I do appeal and urge you to use your sense of justice, your sense of duty, and your sense of fair play. You must be fair to the people of this county and to this defendant and nobody knows more. With all the humility in the world, I ask you to bring back the maximum sentence of death.

THE COURT: Members of the jury, look this way just a minute, please. Here are your verdict forms. As you know, you have the two options. If you find that his sentence should be death, then your foreman, whom you elect, signs the bottom line here on the first form. If you find that the punishment should be life imprisonment, then your foreman signs the second form.

Now, we are going to send with you the verdict forms, these two instructions, and all of the exhibits in the case. Retire to your room now and consider your duties. And when you get through, knock on the door and we'll be here waiting for you.

VIRGINIA:

IN THE CIRCUIT COURT OF
THE COUNTY OF AMHERST

INSTRUCTION NO: 1-P

You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.

Given
/s/ RCG

INSTRUCTION NO: 2P

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

Given
/s/ RCG

Instruction AB

In addition to the mitigating factors specified in other instructions, you shall consider the circumstances surrounding the offense, the history and background of Douglas McArthur Buchanan, Jr., and any other facts in mitigation of the offense. If you find the existence of any facts which mitigate against the death penalty, then you shall consider those facts in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AC

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence. If any juror does not believe the sentence of death is warranted under these instructions, then a sentence of life imprisonment shall be imposed.

Refused
/s/ RCG

Instruction AG

If you find that Douglas McArthur Buchanan, Jr. has no significant history of prior criminal activity, then that is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AH

If you find that the capital felony was committed while Douglas McArthur Buchanan, Jr. was under the influence of extreme mental or emotional disturbance, then that is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AI

If you find that at the time of the commission of the capital felony, the capacity of Douglas McArthur Buchanan, Jr. to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, then that is a fact which mitigates against imposing the death penalty, and you shall

consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AJ

The age of Douglas McArthur Buchanan, Jr. at the time of the commission of the capital offense is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

VIRGINIA:

IN THE CIRCUIT COURT OF
THE COUNTY OF AMHERST

COMMONWEALTH,

Plaintiff

v. VERDICT OF JURY

DOUGLAS MCARTHUR BUCHANAN, JR.,

Defendant

We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

Signed Myra J Ramsey
Foreman

OR

We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately and with premeditation killed more than one

person, namely, Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as a part of same transaction and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____
Foreman

SUPREME COURT OF VIRGINIA
DOUGLAS MCARTHUR BUCHANAN, JR.

V.

COMMONWEALTH OF VIRGINIA

Record Nos. 890107 and 890108

September 22, 1989

* * *

I. FACTS

The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that day, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.

Buchanan found his father outdoors behind the house. He explained his having the rifle by telling his father that he had been squirrel hunting. The two went inside where they engaged in conversation. They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother.

Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.

Fifteen minutes later, Buchanan heard his brothers arriving from school. He stood waiting behind the living room door, rifle in hand. Donnie, who was ten years old, came in first and walked past Buchanan who shot him in the back of the head. Buchanan then placed the rifle to Donnie's face and shot him near the right temple.

J.J., who was thirteen years old, heard the shots and started to run. Buchanan went outside to the porch and shot J.J. twice as he ran. He then helped J.J. walk inside the house where he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second

attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra column, severing the windpipe and all major veins and arteries in her neck. She also sustained defensive wounds to her hands.

Buchanan ran from the house through the woods to his parked vehicle. Along the way, he tossed his bloody tennis shoes and the knife into a dumpster. As his wife drove him away, he tossed the rifle out of the window.

* * *

Buchanan's descriptions of what transpired just prior to his father's murder were as follows: In his first confession, he stated that he and his father were inside the house talking but his father did not ask how Buchanan and his wife were doing. Buchanan said this omission "was really making [him] mad." He stated that he and his father started arguing but he immediately explained without any prodding from the examiners that: "I mean it wasn't – I mean it wasn't a heated argument." Buchanan continued: "all right – then he started to walk out the door and I shot him" Buchanan's interviewer asked him to explain exactly what happened. Buchanan replied, "[h]e turned around instead of walking out the door and I shot him from behind." Asked what happened next, Buchanan answered: "And then he fell to the ground and I shot him again."

Buchanan was then asked specifically whether he and his father were arguing at the time Buchanan, Sr. was

killed; Buchanan said no: "See we weren't arguing at the time. What he was doing was gonna show me his blue Nova [automobile], cause I hadn't seen it before." The interviewer asked what lead up to the murders; Buchanan replied: "They never treated me like a son – they treated me like an outsider all the time, I mean – I don't think they cared." Again Buchanan was asked whether it was any particular thing that "set it off at this particular time." He replied: "there was no one thing that they could of done that – would have done that, it's just that I mean, they never talked to me when I was living there."

In his second confession, Buchanan stated that he and his father were inside the house talking "and started arguing – not really arguing but just, you know, just disagreeing, mostly. And just hassling – it's been going on between us and things like that. Then uh he wanted to talk and showed me the – the newest Nova that he had." Buchanan stated further that: "And uh and then I shot him then – before he went out the door." When asked where he shot his father, Buchanan replied: "From the back – and in the back of the head." Then Buchanan shot his father again, this time in the face.

At trial, on direct examination, Buchanan said that he and his father were inside the house talking when his father said that Mrs. Buchanan was cheating on him. Buchanan suggested that his father get a divorce. His father replied that "it would have been the same way if [Buchanan's] . . . real mother was alive." Buchanan testified that as his father talked, *his father* was getting "pretty mad" at Buchanan. Buchanan's counsel asked him how he felt when his father said his deceased natural mother

would have been unfaithful; Buchanan responded: "I was getting mad. I was sweating. I was getting real hot and I was shaking." When Buchanan tried to defend his natural mother, his father broke off the conversation saying, "that's it, let's go out and look at this car I bought for J.J." These questions and answers followed:

Q. And then what happened?

A. Then he started to walk out the door and I shot him.

Q. Why did you do it?

A. I don't know, I was just mad. I just was – I don't know really why I did it. I didn't mean to. It just happened.

Q. Well, what happened after you shot him?

A. I just kind of stared at him for a minute – I don't know – I didn't know – I was scared – I didn't know what to do. And then I shot him again.

On cross-examination, Buchanan testified that the argument with his father had not been heated: "It wasn't really heated. It's just that he yelled at me a couple of times." "It was no stand up arguing or pushing or anything like that." "[W]e were both getting mad, but we were not pushing or fighting." Buchanan also admitted that his father tried to call off the disagreement by suggesting that he and his son go outside to look at a car. Buchanan further admitted that when he pulled the trigger he intended to kill his father.

[24] We are of opinion that Buchanan was not entitled to a second degree murder instruction regarding his

father's murder. This murder was planned. The only reason it was not carried out the day before was because Buchanan made a conscious decision not to do it at that time. But, the next day, he returned to his father's house prepared to kill and intending to kill.

* * *

[35] Buchanan submits that it was error to list the statutory aggravating factors for the jury while refusing to list the mitigating factors mentioned in the statute. Even in advancing this argument, Buchanan admits that it is contrary to *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986). Yet he asks us to reconsider *Watkins*. We decline the invitation. The rule that the mitigating factors mentioned in the statute must not be listed is intended to benefit the defendant. If the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation. But the intent of the statute is to leave the jury free to consider, in mitigation, whatever the jury deems appropriate. *Watkins*, 229 Va. at 491, 331 S.E.2d at 438; *Clark*, 220 Va. at 212, 257 S.E.2d at 790.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

DOUGLAS MCARTHUR BUCHANAN,	)	
Petitioner,	)	**Civil Action No. 93-0306-R**
v.	)	**ORDER**
EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEP'T OF CORRECTIONS AND THE COMMONWEALTH OF VIRGINIA,	)	(Filed Jan. 25, 1996)
Respondents.	)	**By: Hon. James C. Turk United States District Judge**

In accordance with the written memorandum opinion entered this day, it is hereby

ADJUDGED AND ORDERED

(1) that respondent's motion to dismiss the above referenced petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, shall be and hereby is **GRANTED**;

(2) that the petition for *habeas* relief shall be and hereby is **DENIED**;

(3) that petitioner's motion for discovery shall be and hereby is **DENIED**; and

(4) that this action is stricken from the active docket of this court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 25th day of January, 1996.

/s/ James C. Turk
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DOUGLAS McARTHUR BUCHANAN, **Petitioner,** **v.** **EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPT. OF CORRECTIONS, AND THE COMMONWEALTH OF VIRGINIA,** **Respondents.**	**Civil Action No. 93-0306-R** **MEMORANDUM OPINION** (Filed Jan. 25, 1996) **By: Hon. James C. Turk United States District Judge**

DOUGLAS McARTHUR BUCHANAN brings this action as a petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254. He states that he is confined by respondents under a sentence of death at the Mecklenburg Correctional Center, located in Boydton, Virginia. He claims that his confinement is in violation of the Constitution of the United States for the reasons set forth herein. Respondent has filed a motion to dismiss the §2254 petition as meritless, to which petitioner submitted a memorandum in opposition. Respondent then submitted a reply to petitioner's memorandum, to which petitioner again filed a memorandum in opposition. The court has also received the complete trial, appellate and post-conviction record of petitioner's case. After review of the record and the pleadings submitted by the parties, the court finds no

material issues of fact to be in dispute and, thus, determines that no evidentiary hearing is necessary to evaluate the merits of petitioner's *habeas* claims. Furthermore, in accordance with the following, it is the opinion of the court that the motion to dismiss must be granted and that the petition for *habeas corpus* must be denied.

I. FACTS

Petitioner Douglas McArthur Buchanan, Jr., was convicted by a jury in the Circuit Court for Amherst County, Virginia, for killing his father, Douglas Buchanan, Sr.; his stepmother, Geraldine Buchanan; and his two stepbrothers, Donnie and J.J. Buchanan on September 15, 1987. Buchanan was nineteen years old at the time of the killings. Although he confessed to performing the killings, he asserts his wife, Christianne, two years his senior, was the driving force behind the murders. She has also confessed to her participation in planning and preparing for the killings.

Family history seems to have played some part in the killings. Buchanan's natural mother died after a long illness when he was nine. Six months later, his father married Geraldine, a first cousin of Mrs. Buchanan. When he was a young child and then while his mother was sick, Buchanan often stayed with her parents and other relatives on her side of the family. About a year after his mother's death, however, some sort of family feud arose between his parents (his father and Geraldine) and his natural mother's relatives. Buchanan was punished if he waved or talked to them, even though they lived close by. Geraldine removed or burned all the pictures of his

mother that she could find, saying she wanted to be his only mother. His parents also forbade him from visiting his mother's grave. He had other disagreements with his parents over chores and extracurricular activities. He ran away on several occasions and joined the National Guard before finishing high school.

On December 8, 1986, Buchanan married Christianne secretly. After his parents discovered the marriage, the couple lived in Buchanan's bedroom in his parents' home for several months. Later, his parents helped the young couple get their own housing. In June, 1987, Buchanan had an emergency appendectomy. While he was in the hospital, Christianne invited his mother's relatives to visit him, angering Buchanan's father and Geraldine. Buchanan testified that he and Christianne did not speak to his parents from June until September.

On September 14, 1987, Buchanan and Christianne talked about killing his parents.[1] The two of them even drove to the Buchanan home that evening, but Buchanan decided not to kill anyone that night and they left. The next day, September 15, Buchanan missed work. He and Christianne drove to the Blue Ridge Parkway and had a picnic at a spot within several minutes walk of the Buchanan home. Sometime around 3:00 in the afternoon, Buchanan walked from the picnic spot to his father's

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[1] According to Buchanan's testimony, Chris told him that the only way to solve his family problems was to kill the family. Buchanan asserts that Christianne was highly unstable and that she resented Geraldine, perceiving her as competition for his affection. She was dismissed from the Air Force on psychiatric grounds shortly after she and Buchanan married.

house. He carried a .22 caliber rifle and a pair of rubber gloves. He found his father in the yard and told him that he had been squirrel hunting. They went inside and talked for awhile without incident, but then the conversation turned to an old disagreement over the supposed infidelity of Buchanan's natural mother. The discussion angered them both, and there was considerable yelling. Even so, Buchanan told police that it was not a heated argument.

The father changed the subject and asked Buchanan to come outside to see a car he had recently purchased for J.J., Buchanan's thirteen-year-old stepbrother.[2] As his father walked toward the door, Buchanan shot him in the back of the head. The father fell. Buchanan then placed the nose of the rifle against his father's forehead and fired again. Buchanan dragged the body to the master bedroom and put a towel over the face. He got a .22 caliber pistol from under a mattress and took it with him back to the living room.[3]

About fifteen minutes later, Buchanan heard Donnie and J.J. arriving home from school. Holding the rifle, he hid behind the door. As Donnie, age ten, walked in the door past Buchanan, Buchanan shot him in the back of

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[2] Buchanan testified that this remark angered and hurt him because he had not been allowed to get a driver's license until he was eighteen, and he had never been given a car.

[3] Buchanan testified at trial that he thought about killing himself at this point and that he was about to leave the house when his stepbrothers came home.

the head[4] and then in the face near his right temple. J.J. heard the shots and ran back out into the yard where Buchanan shot and wounded him in the back. Buchanan promised to call for help and coaxed J.J. to come back into the house where Buchanan shot him a second time, in the head. Buchanan pulled the boys' bodies out of the living room, but J.J. was still alive. He got up and walked back into the living room. Buchanan got a knife from the kitchen and stabbed the boy numerous times in the head, back and neck, severing his carotid artery.

Buchanan testified that he had blamed Geraldine, his stepmother, for all the family problems, since they started with her marriage to his father. He stated that on September 15, he went to the house intending to talk to her, expecting that she would be home alone.[5] After killing his father and the boys and moving their bodies, Buchanan testified, he grew very angry at Geraldine and determined to kill her also. He spread a blanket over the bloodstains in the living room and waited for her to come home. When he heard her arrive, he hid behind the door. As she stood in the living room, he fired at her, but the

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[4] Buchanan testified that he did not intend to shoot, that the rifle just went off. He said that he had never planned to kill the boys, but testified that "it just happened" and that he went "crazy" after killing his father.

[5] He testified that he took the gun to the house for protection, as Geraldine had once drawn a gun to break up a fight between Buchanan and his father. He remembered that Geraldine usually tried to be home by 3:00 in the afternoon on weekdays, before the boys got home from school, but she had recently started a new session of classes at Sweetbriar College and was working part time.

gun did not function. He fired again, and the bullet grazed her head. She fell to her knees. Buchanan stabbed her repeatedly with the kitchen knife in the neck, skull and chest. Her neck was severed to the spine, and she had knife wounds in her hands as though she had tried to defend herself.[6]

Taking the knife and the rifle, Buchanan fled from the house and walked through the woods back to the Parkway where Christianne was waiting in their truck. She drove and helped him dispose of his bloody tennis shoes, the knife and the rifle. Buchanan and Christianne fled to New Mexico where they were ultimately apprehended and confessed to the murders.

II. PROCEDURAL HISTORY

On October 6, 1987, Buchanan was indicted by a Grand Jury of Amherst County, Virginia, for four capital murders and four counts of use of a firearm in the commission of a murder.[7] Three of these initial capital murder indictments were later quashed. The Grand Jury then issued two additional capital murder indictments of two counts each and separate indictments bringing four counts of first degree murder. Buchanan objected to the additional capital murder indictments as vague and

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[6] Buchanan denies that she struggled.

[7] As now numbered, Va. Code Ann. §18.2-31(7), the Virginia death penalty statute, provides that a person may be charged with capital murder for "[t]he willful, deliberate, and premeditated killing of more than one person as part of the same transaction."

redundant.[8] In February, 1988, the Circuit Court for Amherst County denied Buchanan's motion for a change of venue. In April, the court denied petitioner's motions for additional peremptory challenges, his motion to sequester the jury, and his renewed motion for change of venue. On April 25, 1988, Buchanan pled not guilty to all charges.

The Amherst Circuit Court conducted a jury trial April 26-28, 1988. The jury convicted Buchanan of at least one charge of capital murder, four counts of first degree murder, and four counts of use of a firearm in the commission of a murder. After a separate sentencing hearing on April 29 and 30, 1988, the jury sentenced Buchanan to death on the capital murder conviction, to life imprisonment on each of the four first degree murder charges, to two years on one of the firearms charges, and to four years on each of the three remaining firearms charges. On August 19, 1988, after reviewing the state probation officer's post-sentence report and denying petitioner's requests for additional neurological testing, the court overruled petitioner's motion to set aside the verdict of the jury and imposed the jury's recommended sentences.

On September 22, 1989, the Supreme Court of Virginia set aside the first degree murder conviction for the killing of Buchanan's father, and affirmed the capital murder conviction, the remaining three first degree murder convictions, and the firearms convictions. *Buchanan v. Commonwealth*, 384 S.E.2d 757 (Va. 1989), *cert. denied*, 493

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[8] The specific posture of the indictments in Buchanan's case will be discussed in greater detail, *infra*, in conjunction with the court's analysis of his claims involving the indictments.

U.S. 1063 (1990) [hereinafter *Buchanan*]. By order dated January 22, 1990, the United States Supreme Court denied a petition for writ of certiorari. *Buchanan v. Virginia*, 493 U.S. 1063 (1990).

In June, 1990, Buchanan filed a petition for writ of *habeas corpus* in the Circuit Court of Amherst County, Virginia; he subsequently amended the petition in September, 1990. The Circuit Court, by order dated August 15, 1991, dismissed all of petitioner's claims except one allegation of ineffective assistance of counsel. On September 24, 1990, the Circuit Court conducted an evidentiary hearing on this sole remaining allegation, but issued a final order dismissing all of Buchanan's *habeas* claims on December 19, 1991. Buchanan filed a petition for appeal of this dismissal to the Virginia Supreme Court. By unpublished order dated June 25, 1992, the Virginia Supreme Court denied the petition. Buchanan then filed a timely petition for writ of certiorari to the United States Supreme Court which was denied. *Buchanan v. Murray*, 113 S.Ct. 501 (1992).

III. PETITIONER'S CLAIMS

I. During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

II. The penalty phase instructions to the jury were constitutionally deficient because they failed to

instruct the jury sufficiently as to mitigation and as to the aggravating circumstance of "vileness."

A. The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

B. The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

C. The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

D. The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

III. Virginia's capital punishment statute, as interpreted by the Virginia Supreme Court, and as applied in this case, is unconstitutional.

A. Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

B. Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

C. Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in

Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

D. Virginia does not provide meaningful appellate review and did not in Buchanan's case.

E. Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

IV. The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

V. During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

VI. Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

VII. Buchanan was denied due process, assistance of counsel and the right to present evidence by the vague and inappropriate framing of the indictments.

A. Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

B. The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the number of indictments.

VIII. The trial court unconstitutionally denied Buchanan's motion for change of venue.

A. Pretrial publicity about the crimes and the trial of Buchanan's wife so tainted the local jury pool that a change of venue should have been granted.

B. Pretrial publicity which included wholly false accounts that the killings were committed for financial gain so tainted the local jury pool that a change of venue should have been granted.

IX. The trial court committed constitutional errors during jury *voir dire*.

A. The trial court refused to let defense counsel ask about jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

B. The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

C. The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them.

X. The trial court made constitutional errors regarding selection and sequestration of the jury.

A. The trial court failed to sequester the jury.

B. The trial court failed to grant additional peremptory challenges during jury selection.

XI. Imposition of the death penalty constitutes cruel and unusual punishment.

XII. Buchanan was denied effective assistance of counsel.

A. Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on grounds of double jeopardy.

B. Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

C. Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

D. Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

E. Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

F. Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

G. Counsel made evidentiary errors.

1. Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

2. Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

H. Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

XIII. Other constitutional violations:

A. The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

B. The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.

C. The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.

D. Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.

E. Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.

IV. OPINION OF THE COURT

A. Exhaustion and Procedural Bar

In reviewing the record, the court finds several of Buchanan's claims to be barred from federal *habeas* review under the doctrines of exhaustion and procedural default. A federal court may not grant a petition for writ of *habeas corpus*, pursuant to §2254, unless petitioner has exhausted the remedies available in the courts of the state which convicted him. §2254(b). To exhaust his state court remedies, a death penalty defendant in Virginia must present his claims to the Virginia Supreme Court, through one of the following methods. First, he appeals the conviction and sentence directly to the Virginia Supreme Court. Va. Code Ann. §17-116.05:1(B). Second, he can file a state *habeas* petition with the circuit court where he was convicted, with appeal of an adverse decision to the Virginia Supreme Court. Va. Code Ann. §8.01-654; §17-116.05:1(B). Finally, he can exhaust his remedies by filing a state *habeas* petition directly with the Virginia Supreme Court. Va. Code Ann. § 17-97. Buchanan has exhausted his state court remedies as to most of his claims by presenting them to the Virginia Supreme Court, either on direct appeal or in his state *habeas* petition and appeal therefrom or both.

Federal review of fully exhausted claims may be barred because petitioner has defaulted some state procedural rule. Where petitioner has failed to comply with a state procedural rule and the state supreme court has expressly relied on that procedural default as an adequate and independent state law ground for denying relief on a claim, federal review of that claim is normally barred. *See Harris v. Reed*, 489 U.S. 255, 262 (1989) and *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). A federal court may review defaulted claims only if petitioner excuses his default through a showing of cause for the default and resulting prejudice or a showing of actual innocence. *Harris*, 489 U.S. at 262.

On direct appeal, the Virginia Supreme Court found several of Buchanan's claims barred under Virginia's contemporaneous objection rules. In its order denying Buchanan's appeal from the circuit court's denial of his state *habeas* petition, the Virginia Supreme Court found several claims, or parts of them, to be barred by the rule of *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974), *cert. denied*, 419 U.S. 1108 (1975).[9] Under the *Slayton* rule, claims which should have been raised at trial and/or on direct appeal, but were not raised at the proper time, cannot constitute grounds for state *habeas* relief. *Id.* Unless Buchanan can excuse his defaults of these claims,

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[9] Analysis of exhaustion and procedural default in this case is complicated by the fact that the claims were numbered differently in state and federal proceedings, despite the fact that present counsel also represented petitioner in the state *habeas* proceedings.

the court is barred from review of the merits even though the claims are exhausted. *Harris*, 489 U.S. at 262.

Ordinarily, in order to give state courts the opportunity to pass on the constitutionality of their criminal convictions and sentences, if a state *habeas* petitioner has not exhausted his available state remedies as to some of the claims raised in the federal petition, a federal court should dismiss the entire petition without prejudice to allow exhaustion of the claim before the state courts. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). However, where a petitioner has not exhausted his state court remedies as to some claims, but has exhausted others, the federal court looks to applicable state law under which the state court would have ruled on the unexhausted claims; if it is clear that the state's procedural law would now bar state review of the unexhausted claims, should petitioner attempt to exhaust his state court remedies, the federal court need not dismiss the petition to require complete exhaustion. *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Nevertheless, federal review of the claim is barred, based on petitioner's default of the state procedural rules, unless petitioner demonstrates cause and prejudice or actual innocence to excuse the default. *Teague*, at 298; *Bassette*, at 937.

Part or all of certain claims in Buchanan's federal *habeas* petition have not been presented to any state court. Although these claims are not exhausted as normally required under §2254, they are based on facts which Buchanan knew or reasonably should have known at the time he filed his state *habeas* petition. Accordingly, the Virginia Supreme Court would now find all of these

claims procedurally defaulted under Va. Code Ann. §8.01-654(B)(2). Under this statute, *habeas* relief cannot be granted in a later petition if petitioner knew or should reasonably have known all the facts necessary to those claims at the time he filed an earlier state petition. *Id.* Because the inevitable procedural default of Buchanan's unexhausted claims under §8.01-654(B)(2) serves as an adequate and independent state law ground on which the claims must be decided, this court need not dismiss the petition to allow exhaustion of these claims; nevertheless, the court is barred from review of the merits by the state procedural default, absent a valid excuse for the default. *See Teague*, 489 U.S. at 297-98; *Bassette*, 915 F.2d at 936-37. If Buchanan can demonstrate cause and prejudice for his procedural default of these claims, or show actual innocence, this court may address his unexhausted claims on the merits even though no state court has considered them.

As to several of these claims, Buchanan attempts to excuse his procedural default by arguing that ineffective assistance by his trial counsel caused the default by failing to raise the claim at trial. Ineffective assistance of counsel can constitute cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, petitioner must show that (1) the ineffective assistance itself was constitutionally significant, *Strickland v. Washington*, 466 U.S. 668, 687 (1984); (2) the ineffective assistance claim was presented to the state courts as required for exhaustion under §2254; and (3) the ineffective assistance claim itself has not been defaulted, *Murray*, at 488-89. *See also Justus v. Murray*, 897 F.2d 709, 713 (4th Cir. 1990). Under the principles of comity inherent in §2254,

the Virginia court must have a meaningful opportunity to consider the ineffective assistance claim before this court may address it, as a substantive claim or as cause to excuse procedural default of another substantive claim.

Petitioner also argues that he should be excused from exhausting several of his claims because raising the claims to the Virginia courts was or would now be futile, as the Virginia Supreme Court had addressed similar issues in earlier cases and ruled against petitioner's position. Buchanan further asserts that if futility excused him from exhausting the claim in the first place, then procedural default is not even an issue since default occurs during the exhaustion process. It is the opinion of the court that, under controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, this argument fails.

In rare cases, exhaustion of §2254 claims before the state courts may be excused by futility. (1) If the procedural rule under which the state court has found or would find default does not qualify as an independent and adequate state law ground upon which the claim must be decided and (2) exhaustion of the substantive claim before the state courts would be futile (because the state court has recently ruled decisively in a similar case against the legal theory supporting the claim), the federal court may reach the merits without dismissing the entire petition to require complete exhaustion, even if no state court has had opportunity to review the unexhausted claim. *See Adkins v. Bordenkircher*, 674 F.2d 279, 281 (4th Cir. 1982), *cert. denied*, 459 U.S. 853 and 459 U.S. 878 (1982). However, where a claim is clearly procedurally defaulted or would be procedurally defaulted if now

raised to state courts, futility offers no excuse for petitioner's exhaustion errors. *See id.; Engle v. Isaac*, 456 U.S. 107, 129 (1982).

In *Engle v. Isaac*, the United States Supreme Court reaffirmed previous holdings that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." 456 U.S. at 129. Like Buchanan, Petitioner Isaac argued that he should be excused by the futility exception for failing to raise his claim properly to the state courts because state courts had already ruled decisively against similar legal arguments in an earlier case and would surely rule against his claim. The Supreme Court refused this excuse adamantly:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

Id. at 130. The court finds *Engle* and *Bordenkircher* to be consistent in holding that futility cannot excuse petitioner's failure to exhaust a *habeas* claim which is clearly procedurally defaulted, or would be procedurally defaulted if now presented to state courts, under a state

procedural rule which serves as an adequate and independent state law ground for disposition of the claim.

The claims which Buchanan attempts to excuse under the futility argument were either found by the Virginia Supreme Court to be procedurally barred under *Slayton*, 205 S.E.2d at 682, or Supreme Court Rule 5.25, or would now be barred under §8.01-654(B)(2), as Buchanan has already filed one state *habeas* petition. These Virginia default rules have been repeatedly held to qualify as adequate and independent state law grounds disposing of claims before a court may reach the merits. *See Bassette*, 915 F.2d at 936; *Whitley v. Bair*, 802 F.2d 1487, 1501 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Johnson v. Muncy*, 830 F.2d 508 (4th Cir. 1987). Based on the foregoing, it is the opinion of the court that Buchanan cannot rely on the futility doctrine to excuse either his failure to exhaust or his procedural default of any of his claims.[10]

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[10] Buchanan cites *Nix v. Whiteside*, 475 U.S. 157, 163 n. 3 (1986) as an indication that the United States Supreme Court still recognizes futility as an excuse for exhaustion of *habeas* claims. Footnote 3 in *Nix* recognized that the United States Court of Appeals for the Eighth Circuit and the district court had both found Petitioner Whiteside's *habeas* claim to be properly exhausted "since further proceedings would be futile." However, the Eighth Circuit based its refusal to require further exhaustion of Whiteside's ineffective assistance claim on two particular findings, unique to the facts of Whiteside's case: (1) the court found that further exhaustion of the claim would be futile because the state supreme court had "already determined that the state code of professional responsibility vindicated [petitioner's] counsel's actions and had in fact commended counsel for the 'high ethical manner' in which the matter had been handled"; and (2) as the ineffective assistance claim was so closely tied, factually and analytically, to federal due process and fair trial claims which Whiteside had already presented to the state court, the court found that the substance of petitioner's ineffective assistance claim had been presented to state courts sufficiently to satisfy §2254 exhaustion requirements as defined in *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (see additional discussion, *infra*). *Whiteside v. Scurr*, 744 F.2d 1323, 1326-27 (8th Cir. 1984). In essence, the Eighth Circuit determined, the state supreme court had already addressed both the factual and the legal aspects of the ineffective assistance claim; accordingly, the court reasoned, the claim was exhausted and not defaulted, allowing federal review of the merits. Buchanan's case does not equate with the unique posture of Whiteside's case, and the mere use of the word "futile" by the Supreme Court in *Nix* does not magically legitimize Buchanan's futility arguments in the face of *Engle* and *Bordenkircher*.

B. Analysis of Petitioner's Individual Claims

Claim I: During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

Petitioner argues that his right to due process was violated when the trial court excluded testimony at the sentencing phase of the trial upon the basis of hearsay. During that phase of the trial, petitioner attempted to elicit testimony from his expert witness, Dr. Robert S. Brown, Sr., as to the content of statements made to him by other individuals during the course of interviews conducted for the purpose of discovering Buchanan's mental and emotional history. Petitioner offered this testimony to

provide factual support for Dr. Brown's expert opinion that the circumstances of petitioner's family history played a large role in his decision to kill certain members of his family. However, the Commonwealth objected to the admissibility of these out of court statements on hearsay grounds. The court sustained the objection but offered to allow Buchanan an opportunity to summon the declarants to testify as to their own statements. Counsel declined the offer and limited examination to questions directly addressing Dr. Brown's expert opinion.

Relying primarily on *Green v. Georgia*, 442 U.S. 95 (1979), petitioner maintains that the court should have permitted Dr. Brown to testify as to the statements on which he based his expert opinion. In *Green*, the Supreme Court held that a "mechanistic" application of state evidentiary rules at the sentencing phase of capital trial could rise to the level of a due process violation if there existed factors weighing against strict application of the rules. *Id.* at 97. Petitioner contends that, without the support of the interviewees' statements, Dr. Brown's opinions were robbed of any persuasive effect they might have had. Petitioner argues that, in view of this detrimental impact on Dr. Brown's expert opinion and the absence of any indicia of unreliability, the application of the hearsay rule to Dr. Brown's proffered testimony was so mechanistic as to rise to the level of a due process violation.

In response to these arguments, respondent refuses to acknowledge that the exclusion of testimony upon the basis of a state evidentiary rule could rise to the level of a due process claim. While such a position is clearly in conflict with *Green v. Georgia, supra*, the court must nevertheless agree that the application of the hearsay rule in

this particular instance does not rise to the level of a constitutional violation. In *Green*, the Supreme Court dealt with a situation in which a state court had excluded testimony at the sentencing phase of a criminal trial upon the basis of hearsay, even though it had admitted this same testimony at the guilt phase of a codefendant's trial. The testimony at issue involved an out of court statement proffered to show that the defendant had not been physically present when the victim had been killed by his codefendant. Consequently, the out of court statement bore upon a *precise* factual issue which was highly relevant to the defendant's culpability. Moreover, the proffered statement in *Green* had been uttered by the codefendant under circumstances in which there was no indication of ulterior motive, thus lending the statement a great deal of reliability. 442 U.S. at 97.

Although it cannot be denied that facts relayed by individuals who personally knew a capital defendant may also be highly relevant to whether the death penalty should be imposed, the statements in Buchanan's case were only offered to support an expert's opinion that was, in fact, presented to the jury. The statements at issue, therefore, would have born [sic] only indirectly on petitioner's character and culpability and, as such, would have been of somewhat limited probative value. Yet, there was no assurance of reliability other than petitioner's representations that the declarants had no reason to be untruthful given the purpose of Dr. Brown's interviews. Accordingly, the statements in this case were not only less probative, but also bore fewer indicia of reliability than did the statement in *Green*.

Furthermore, and perhaps even more importantly, the court gave Buchanan every opportunity to call those individuals whom he felt were essential to proving the existence of mitigating circumstances. He cannot now complain that the court erred by prohibiting the admission of hearsay when he had the option of introducing the direct testimony of the declarants themselves. If the testimony of these individuals was important to the demonstration of a mitigating factor, petitioner's counsel would clearly have taken the time to call those individuals into court. Indeed, even without the opportunity to quote statements made by the persons whom he had interviewed, Dr. Brown was able to provide a lengthy and detailed history of petitioner's mental and emotional history. Accordingly, the court must deny relief on Claim I of the petition.

Claim IIA: The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

Petitioner next contends that the jury instructions at the sentencing phase of the trial were inadequate to inform jurors of all the mitigating factors which they could consider in determining whether the death penalty should be imposed. However, a federal court should avoid attempting "to prescribe the particular form which state jury instructions on mitigation must take." *Briley v.*

Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). In fact, in *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992), the Court of Appeals for the Fourth Circuit reviewed jury instructions substantially similar to the instructions at Buchanan's trial and found that they satisfied the requirement for individualized sentencing under the Eighth and Fourteenth Amendments.[11] Specifically, the court in *Jones*

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[11] In *Jones*, the court gave the following instructions to the jury:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible or inhuman, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> The Court instructs the Jury that even if you believe beyond a reasonable doubt that such facts and circumstances have been proven as to permit the Death Penalty, it is still the prerogative of the Jury to decide whether death should be the punishment or not, and the Jury is under no obligation or compulsion to find the punishment should be death.

947 F.2d at 1120.

In Buchanan's case, the trial court gave the following instructions to the jury:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that [the Defendant's] conduct in committing the murders . . . was outrageously or wantonly vile, horrible or inhuman, in that it involved torture depravity of mind or aggravated battery to . . . the victims, or to anyone of them.

held that an instruction directing a jury to consider "all the evidence" was sufficient to assure that the jury would weigh both mitigating and aggravating factors. 947 F.2d at 1120. In reaching its conclusion that the instructions were constitutionally adequate, the Fourth Circuit also noted favorably that the statutory verdict form used at Jones' trial, which was identical to the one used at petitioner's trial, required the jury to recite that it had "considered the evidence in mitigation of the offense." *Id.* Accordingly, the court must deny relief on this ground.

Claim IIB: The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

The Virginia Supreme Court expressly held that this claim was procedurally barred from state *habeas* review under the rule of *Slayton v. Parrigan*. 205 S.E.2d at 682. Buchanan admits that he did not litigate this claim at trial. Although counsel submitted several proposed jury instructions regarding mitigation evidence, which the court refused, they did not request an instruction stating that the jury need not unanimously agree upon particular

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> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or *if you believe from all the evidence that the death penalty is not justified*, then you shall fix the punishment of the defendant at life imprisonment.

(emphasis added)

mitigating factors in order to find mitigation of the death sentence.

Buchanan argues that his undisputed procedural default of this claim at trial should be excused because counsel provided constitutionally ineffective assistance when they failed to propose a unanimity instruction. However, petitioner did not present this ineffective assistance argument to the Virginia courts during *habeas* proceedings and does not present any excuse here for his failure to do so. As an unexhausted and defaulted ineffective assistance claim cannot serve as cause to excuse any other procedural default, the court is barred under the doctrine of procedural default from reviewing the merits of Claim IIB. *See Justus*, 897 F.2d at 713.

Claim IIC: The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

Likewise, procedural default bars the court from reviewing the merits of this claim. Buchanan's trial counsel did not object to the penalty phase instruction on "vileness." Because Buchanan never presented this claim to Virginia courts and would be barred from doing so now under Va. Code Ann. §8.01-654(B)(2) and *Slayton*, 205 S.E.2d at 682, the claim is also barred from review before this court unless Buchanan demonstrates sufficient excuse for his default. *Teague*, 489 U.S. at 297-98; *Bassette*, 915 F.2d at 936-37.

Buchanan argues that counsel's omission at trial represented constitutionally ineffective assistance of counsel which should serve as excuse for his default of the claim at trial and on direct appeal. However, Buchanan never presented to Virginia courts his ineffective assistance argument as cause to excuse his trial default of this claim, so the ineffective assistance claim itself is unexhausted and procedurally defaulted. *See Justus*, 897 F.2d at 713. As a defaulted ineffective assistance claim cannot excuse petitioner's failure to present Claim IIC to Virginia courts, this court is barred from considering Claim IIC on the merits.

Claim IID: The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

Buchanan bases his argument under Claim IID solely on evidence already presented in Claims IIA, IIB, and IIC. He asserts that jury instructions in his case, viewed in totality, were constitutionally inadequate because they failed to guide the jury in deciding both the aggravating factor (vileness) and mitigating factors, making the jury's verdict unreliable and, therefore, unconstitutional. The court has already determined above that instructions regarding mitigation were constitutionally adequate and that the claims regarding unanimity and vileness instructions are procedurally barred from federal *habeas* review. As petitioner has not presented any other argument or evidence in support of his totality claim, it, too, must be dismissed as meritless.

Claim IIIA: Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

Buchanan's third claim is that the Virginia capital punishment statute, as interpreted by the Virginia Supreme Court and as applied in his case, is unconstitutional. As part of this claim, Buchanan argues that Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in his case.

The United States Supreme Court held in *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), that if a state wishes to authorize capital punishment, it has a constitutional responsibility to tailor the law to avoid "the arbitrary and capricious infliction of the death penalty." The state must channel the discretion of the sentencer by providing the guidance of clear and objective standards for imposing the death penalty. *Id*. Because the proper degree of definition of these eligibility factors often " 'is not susceptible of mathematical precision,' a review for vagueness is quite deferential." *Tuilaepa v. California*, 114 S.Ct. 2630, 2635 (1994), *citing Walton v. Arizona*, 497 U.S. 639 (1990). Under these standards, the Virginia capital punishment statute[12] has been upheld against constitutional vagueness challenges on several occasions. *See, e.g. Hoke v.*

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[12] The death penalty statute, Va. Code Ann. § 19.2-264.2, provides:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would

Commonwealth, 377 S.E.2d 595 (Va. 1989), *cert. denied*, 491 U.S. 910 (1989); *Pope v. Commonwealth*, 360 S.E.2d 352 (Va. 1987), *cert. denied*, 485 U.S. 1015 (1988); *Gray v. Commonwealth*, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987); *Stockton v. Commonwealth*, 314 S.E.2d 371, *cert. denied sub nom Stockton v. Virginia*, 469 U.S. 873 (1984); *see also Gregg v. Georgia*, 428 U.S. 153, 201 (1976) (no indication that reviewing court would construe vileness factors in Georgia statute so broadly that they could encompass any murder). The terms of the Virginia statute require that, in order to assess the death penalty upon a defendant convicted of capital murder, the sentencer must find either that the defendant poses a threat of future dangerousness or that the crime committed was outrageously or wantonly vile, horrible, or inhuman. The vileness aggravator is further defined in the statute as involving "torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2.

In *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978), *cert. denied sub nom Smith v. Virginia*, 441 U.S. 967 (1979), the Virginia Supreme Court reasoned that the language defining the vileness aggravator, when given a

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> commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

In the case at hand, the jury was instructed only as to the vileness aggravator, and not on future dangerousness.

reasonable and natural interpretation, accomplished the Virginia legislature's intent to be selective in choosing the types of intentional homicide that would be subject to punishment by death. The court upheld the death penalty statute against petitioner's facial challenge. The court went on, however, to explain how the vileness factors should be interpreted:

> [W]e construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. . . . [W]e construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. . . . It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman."

Id. (citations omitted).

Following *Smith*, most cases addressing the issue of vague instructions or verdict forms in Virginia capital murder cases found that the trial court had included the explanatory language provided in the Virginia Supreme Court's opinion. In the federal courts, Virginia's vileness aggravator has been upheld in cases where the jury was instructed as to the meaning of the elements of the aggravator. *See, e.g. Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir. 1995) (limiting instructions based on *Smith* meet constitutional standards); *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994) (same), *cert. denied sub nom Turner v. Jabe*, 115 S.Ct. 1359 (1995); *Turner v. Bass*, 753 F.2d 342, 353 (4th Cir.

1985) (jury instructed on meaning of "aggravated battery," but jury need not be instructed on each term of the vileness aggravator), *reversed in part on other grounds*, 476 U.S. 28 (1986). The Virginia Supreme Court has upheld the constitutionality of the vileness aggravator where the jury was instructed only on the bare words of the statute. In *Clark v. Commonwealth*, 257 S.E.2d 784, 790 (Va. 1979), *cert. denied*, 444 U.S. 1049 (1980), petitioner objected that the trial court had failed to define the terms of the statute in its sentencing instructions. At trial, the court explained that it felt the terms of the statute were a matter of common knowledge, but offered to consider any definitional instructions that counsel chose to submit. No instructions were submitted (in acceptable form), so none were given. The Virginia Supreme Court upheld the trial court's decision regarding the instructions, saying:

> We agree with the trial court that the terms used in the statute are commonly used and each has an accepted meaning. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error. Although in our review of this case we are guided by our definitions in *Smith*, it does not necessarily follow that these particular definitions were necessary for the jury to determine whether the conduct of [the defendant] was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind or aggravated battery of the victim.

Id. at 790-91; *see also Coppola v. Commonwealth*, 257 S.E.2d 797, 804 (Va. 1979), *cert. denied*, 444 U.S. 1103 (1980) (not imperative that court define the words used in capital

punishment statute; instructions which do not use precise language of *Smith* are not incorrect).

The instructions given in Buchanan's case resemble those given in *Clark* – the trial court simply read the language of the statute as its instruction to the jury. It provided the jury with a verdict form which contained essentially the same language as the statute.[13] The trial court instructed the jury that, having found Buchanan guilty to capital murder, they must determine whether to impose a sentence of death or life in prison. Future dangerousness was not considered, but the court directed that

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McARTHUR Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it

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[13] The verdict form for the capital murder sentencing read:

We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

> involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

(Tr. Trans., v.6, p.1580). Although the instructions did not include further explanation, it is presumed that the Virginia Supreme Court incorporated the *Smith* interpretation in its direct and independent review of the trial and sentencing records. The Supreme Court concluded that the evidence of guilt was sufficient to uphold the conviction, and that the same evidence was relied upon during the penalty phase to support the imposition of the death penalty. *Buchanan*, 384 S.E.2d at 774. "We hold that this death sentence was not imposed arbitrarily or on the basis of passion or prejudice." *Id.*

While the court believes the trial court might have explained the vileness aggravator beyond the language provided in the statute, it was not constitutionally required to do so. Even had the jury been misled or confused by the instruction, the appellate process assured that constitutionally narrow construction of the vileness aggravator was applied to the facts in this case. *See Walton*, 497 U.S. at 655-56; *see also Lewis v. Jeffers*. 497 U.S. 764, 779 (1990) ("Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' has been satisfied." (citations omitted)); *Turner v.*

Williams, 35 F.3d at 893. Petitioner's claim that the aggravating factor of vileness was unconstitutionally vague as applied to his case is without merit.

Claim IIIB: Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

Petitioner next argues that, because a jury may find an offense to be "vile" without reference to a capital defendant's prior history and character and because the Virginia Supreme Court has no mechanism by which to give effect to mitigating circumstances when there is such a finding, petitioner was deprived of an adequate appellate review of his sentence by Virginia's capital sentencing scheme. In *Turner v. Williams*, the Fourth Circuit Court of Appeals reviewed Virginia's capital sentencing scheme under circumstances in which the jury had cited the "vileness" factor as its basis for imposing the death penalty. The Fourth Circuit held in *Turner* that Virginia provides meaningful appellate review for its death penalty cases. Specifically, the *Turner* court found that the Virginia Supreme Court's (1) determination of whether the imposition of the death penalty in a particular circumstance is the product of passion, prejudice or some other arbitrary factor, coupled with (2) a consideration of whether the penalty was excessive, in light of both the offense and the defendant himself and in relation to the punishment imposed in similar cases, satisfies the constitutional requirement of meaningful appellate review in

death penalty cases. 35 F.3d at 893, *citing* Va. Code Ann. § 17-110.1(C).[14]

In Buchanan's case, the Virginia Supreme Court, after hearing arguments and conducting an independent review of the record, specifically held that the death penalty had not been imposed as a result of the passion, prejudice or arbitrariness. The court also concluded that the imposition of the death penalty, under the particular circumstances of petitioner's offense, was not excessive or disproportionate. Although the court made no reference to petitioner's character or personal history, it was clearly authorized to take those factors into consideration under the provisions of Virginia Code § 17-110.1(C); the statute requires the appellate court to review the excessiveness of punishment while also "considering both the crime and the defendant." The court also stated specifically that its review process included consideration of the transcripts from Buchanan's sentencing hearing at which he presented his mitigation evidence.

Petitioner simply did not argue that his sentence was disproportional when viewed in the context of his own personal history. Rather, he challenged the procedures

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[14] Section 17-110.1(C) reads, in relevant part, as follows:

In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

under which the death penalty was imposed at the sentencing phase of his trial. Petitioner cannot now bemoan the Virginia Supreme Court's failure to address all the mitigating circumstances of his offense when he himself did not even raise them as grounds upon which his death penalty should have been overturned. Accordingly, the court must deny relief on this ground, as well.

Claim IIIC: Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

Buchanan admits that this claim was procedurally defaulted because it was not raised at trial; the Virginia Supreme Court also expressly held that the claim was barred from *habeas* review under *Slayton v. Parrigan*. 205 S.E.2d at 682. Petitioner argues that as any competent trial counsel would have objected to the verdict form, counsel's incompetent omission should serve as cause to excuse default of the claim. However, Buchanan did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. The ineffective assistance aspect of the claim is thus defaulted, *Justus*, 897 F.2d at 713, petitioner has failed to show cause for his default of the verdict form claim, and this court is barred from considering it on the merits. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Claim IIID: In capital murder/death sentence cases, Virginia does not provide meaningful appellate review and did not in Buchanan's case.

Buchanan admits that, on direct appeal, he did not raise either a general challenge to the Virginia Supreme Court's review of death sentences or a specific challenge to the court's general review of his own sentence. When he raised these claims in *habeas* proceedings, the Virginia Supreme Court expressly held them barred under the rule of *Slayton v. Parrigan*. 205 S.E.2d at 682. Buchanan argues that it is absurd to expect a defendant to challenge the quality of appellate review in his own case in the very petition requesting that appellate review. The court must agree.

To serve as an independent and adequate state law ground sufficient to bar federal *habeas* review, a state procedural rule cannot force litigants to "resort to an arid ritual of meaningless form." *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (citations omitted). At the time he files an appeal of his death sentence, an appellant cannot know the quality of appellate review that will be given to that appeal. A rule forcing him to challenge the appeal in the appeal prevents him from bringing any factual support to his argument and requires him to assume that the appeal will be denied. Such a rule is not only illogical, but also tantamount to an admission that appellate review of death sentences is a meaningless ritual in Virginia, as the outcome is a foregone conclusion. An illogical and meaningless procedural requirement cannot stand as an independent and adequate state law ground to which a federal court must defer in *habeas* review.

Based on the foregoing, the court finds that Buchanan is procedurally barred at this point from raising a general challenge to the quality of appellate review of death sentences in Virginia or to the constitutionality of the Virginia statute requiring appellate review of death sentences, Va. Code Ann. § 17-110.1(C),[15] as he could have raised such a claim on direct appeal, but did not see. *See Coleman*, 501 U.S. at 750. However, the court also finds that to the extent which this claim challenges the appellate review of Buchanan's own death sentence, the claim is not procedurally barred. At the same time, the court must limit its review of the claim to those arguments and evidence presented to the state courts.

In support of his claim, Buchanan presents an affidavit from attorney Robert Godfrey concerning multiple murder cases decided by the Virginia Supreme Court at or before the time of Buchanan's appeal. Petitioner did not submit this affidavit to the state courts which have reviewed this claim, explaining merely that there was no point since the state courts would only find the claim procedurally barred under *Slayton v. Parrigan*. 205 S.E.2d at 682. Given Buchanan's strong argument that he could not effectively argue a claim about his own appeal in his appeal, it is conceivable that the Virginia *habeas* courts

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[15] "In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

would have accepted this excuse and addressed his claim on the merits, had he also presented factual support for it. To present the claim before the state courts without all the supporting evidence denies those courts a meaningful opportunity to consider the claim itself and ignores the very purpose of the exhaustion requirement of §2254. As Buchanan offers no valid excuse for his failure to present Mr. Godfrey's affidavit to the state courts, this court is barred from considering it. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). This court must consider the claim solely based upon the facts which were also presented to the state *habeas* courts. Specifically, Buchanan alleges that 1) the Virginia Supreme Court did not adequately consider mitigating factors evidence, in determining whether the death sentence had been imposed arbitrarily, and 2) did not properly apply the Virginia proportionality review as required by statute. Va. Code Ann. § 17-110.1(C).

Federal constitutional protections in the death penalty context simply require that the death penalty not be imposed by a state in an arbitrary or capricious manner. *Godfrey v. Georgia*, 446 U.S. at 428. There is no constitutional right to any specific type of state appellate review of death sentences, although most of the statutes which have been upheld as constitutional include provisions for prompt and automatic appeal as one aspect of ensuring that the death sentence was not arbitrarily or capriciously imposed. *See Pulley v. Harris*, 465 U.S. 37, 49-51 (1984). Thus, petitioner's claim must be analyzed on two fronts: 1) whether the Virginia Supreme Court correctly applied Virginia law in Buchanan's death penalty case and 2) whether the review petitioner received was adequate to satisfy the federal protections set forth in *Godfrey*.

The rule in Virginia is that the mitigating factors mentioned in the statute are not listed for the sentencer so that the jury is not misled into thinking those factors are the only ones which may be considered. *Watkins v. Commonwealth*, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986). *See also Zant v. Stephans*, 462 U.S. 862, 890 (1983) (states not constitutionally required to adopt specific standards for instructing jury in its consideration of mitigating circumstances). Thus, there is no appellate review right in Virginia to determine whether the jury's sentencing verdict complied with the mitigating factors listed in the Virginia Code. Indeed, the exclusion of evidence which prevents the sentencer from considering *any* mitigating factor or other relevant circumstance that could cause it to decline imposing death would run afoul of the federal guarantee that all those subject to the death penalty be treated as "uniquely individual human beings." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added); *see McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (state cannot limit sentencer's consideration of any relevant circumstance that could cause it to decide against imposing death).

All that is required under Virginia law, then, is appellate review to determine if the sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." Va Code § 17-110.1(C)(1). As discussed in Claim IIIB above, the Virginia Supreme Court analyzed the record of petitioner's sentencing and found that the death sentence was not arbitrarily imposed. *Buchanan*, 384 S.E.2d at 774. This court has undertaken an independent review of the sentencing phase transcript of Buchanan's trial and does not find fault with the decision

of the Virginia Supreme Court. The sentencing jury heard numerous witnesses tell them about Buchanan's family background: how he was "cut off" from visiting, seeing, or talking to any of his maternal relatives when his mother died and his father re-married, how his grandparents had to go to court for the right to even visit with petitioner for four hours a week, about his father's and step-mother's difficulties with alcohol, about the number of times petitioner ran away from home, and about how that background affected his mental stability. They also heard about how Buchanan regularly attended church, that petitioner turned to substance abuse because of his family problems, about his honorable service in the Army, about the role Christianne Buchanan may have played in encouraging petitioner to kill his family, and about what mental state Buchanan may have been in when he first started arguing with his father on the date of the killings. As the Virginia Supreme Court must have reviewed this evidence when reviewing the sentencing transcript, this court finds that Buchanan received an adequate appellate review of his death penalty case, including all mitigation evidence, in satisfaction of Virginia law and in satisfaction of the federal guarantee that the death penalty be imposed in a non-arbitrary manner.

Nor does Buchanan state a cognizable claim on the question of proportionality review by the Virginia Supreme Court. There is no federal right to proportionality review in a state death penalty case. *Pulley v. Harris*, 465 U.S. at 50-51. Petitioner's federal proportionality claim is, therefore, reduced to a question of due process – whether the Virginia Supreme Court properly applied the proportionality statute, § 17-110.1(C), in his

case. In determining whether a sentence of death is excessive, or disproportionate, the state supreme court need inquire only whether juries in the jurisdiction generally approve the supreme penalty for comparable or similar crimes. *Pruett v. Commonwealth*, 351 S.E.2d 1, 14 (1986), *cert. denied*, 482 U.S. 931 (1987). In Buchanan's case the Virginia Supreme Court stated:

> We have accumulated death penalty cases involving Code § 18.2-31(g), and other death penalty cases involving death by gunshot where the death penalty was based on vileness, and we conclude that juries in Virginia customarily impose the death sentence in cases of this kind.

Buchanan, 384 S.E.2d at 774 (citations omitted).

The Fourth Circuit, in its consideration of *Coleman v. Thompson* 895 F.2d 139, 146-47 (4th Cir. 1990), *aff'd*, 501 U.S. 722 (1991), found that the Virginia Supreme Court's decision not to commute the petitioner's death sentence was supported by its "independent . . . determin[ation] that the sentence of death was properly imposed." The Fourth Circuit held that the Virginia court's review of Coleman's death sentence under Va. Code Ann. § 17-110.1(c). satisfied the constitutional requirements of channeling and limiting the sentencer's discretion to impose the death sentence. *Id.*

The proportionality review conducted by the Virginia Supreme Court in Coleman's case was nearly identical to that court's proportionality review of Buchanan's death sentence. *See Coleman v. Commonwealth*, 307 S.E.2d 864, 877 (Va. 1983), *cert. denied*, 465 U.S. 1109 (1984); *cf. Buchanan*, 384 S.E. 2d at 774. The Fourth Circuit found

that this proportionality review satisfied the requirements of Va. Code Ann. § 17-110.1(C). *Coleman*, 895 F.2d at 147. Thus, it is clear that Buchanan received the full extent of proportionality review to which he was entitled under Virginia law, and, accordingly, that he was not denied due process in violation of the Fourteenth Amendment.

Claim IIIE: Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

All of petitioner's arguments in support of this claim are simply repetition of earlier claims which the court has found to be procedurally barred from federal review or to be without merit. Accordingly, this claim also must be dismissed.

Claim IV: The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

Respondent argues that this claim is procedurally barred from federal review because when Buchanan presented it on direct appeal, he did not assert that failure to instruct the jury on second degree murder violated his federal constitutional right to due process. It is clear that the Virginia Supreme Court analyzed the claim as though it were brought under Virginia law only and found it meritless. In his *habeas* pleadings, Buchanan repeated the claim, but added language contending that failure to give the instruction violated his federal constitutional right to

due process. In denying *habeas* relief, the state circuit court found that the federal constitutional claim was barred by the default rule of *Slayton v. Parrigan*, 205 S.E.2d at 682. The Virginia Supreme Court also applied the *Slayton* rule to the second degree murder instruction claim "to the extent [it] advance[d] matters not asserted on direct appeal." Petitioner argues that because the state and federal claims are all but identical in factual and legal analysis, he has presented the Virginia Supreme Court with the substance of the federal claim in satisfaction of the §2254 exhaustion requirement.

The United States Supreme Court has expressly held that §2254 requires a federal *habeas* petitioner to present the state courts with a "fair opportunity" (1) to address the "substance of his federal *habeas corpus* claim" and (2) "to apply controlling legal principles to the facts bearing upon" that claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982), *citing Picard v. Conner*, 404 U.S. 270, 276-78 (1971). *See also Duncan v. Henry*, 115 S.Ct. 887, 888 (1995) (citing *Harless*, held that failure to exhaust federal due process aspect of *habeas* claim regarding state trial court's evidentiary ruling was insufficient to satisfy §2254 exhaustion requirement). "It is not enough that all the facts necessary to support the federal claim were before the state court . . . or that a somewhat similar state-law claim" was presented to them. *Harless*, 459 U.S. at 6. Petitioner's presentation of his claim must "fairly apprise a reviewing court of a potential federal claim" or he has failed to satisfy §2254 exhaustion requirements. *Id.* at 7 n. 3.

After review of Buchanan's direct appeal, the court finds that his presentation of his second-degree murder instruction claim did not "fairly apprise" the Virginia

Supreme Court that he was raising the claim under both Commonwealth law and federal constitutional law. He does not mention the words "federal" or "constitutional" nor does he cite any federal case law in his argument supporting the claim. Under *Harless* and §2254, this court must find that claim IV as raised in this petition was not adequately presented in Buchanan's direct appeal to satisfy exhaustion requirements. Although Buchanan has now exhausted the federal claim by presenting it to the state courts during *habeas* proceedings, he offers no viable excuse for his procedural default of the claim on direct appeal. Accordingly, the Virginia Supreme Court denial of *habeas* relief under *Slayton* serves as an independent and adequate state law bar to federal review; this court is barred from review of the merits of Claim IV. *Coleman*, 501 U.S. at 750.

Petitioner apparently argues that the court should recognize an exception to the strict pleading requirements set forth in *Harless* where, as here, the state and federal claims are all but identical. *See Briley v. Bass*, 742 F.2d 155, 165 (4th Cir. 1984), *cert. denied*, 469 U.S. 893 (1984) ("Virginia and the Circuit and the Supreme courts agree that lesser-included offense instructions are not required where . . . there is no support for such instructions in the evidence"). *See also Hopper v. Evans*, 456 U.S. 605, 611-12 (1982) (federal rule is that lesser included offense instruction need be given only if evidence would permit jury rationally to find defendant guilty of the lesser offense and acquit him of the greater). The court cannot agree. Before the Virginia Supreme Court, Buchanan clearly sought relief under state law. He gave

the state court no inkling of an intention to implicate the broader reaches of federal due process law as well.

Even assuming that the federal constitutional claim were not procedurally barred, the court finds no merit to the claim. To convict a person of first degree murder, where felony murder is not involved, the prosecution must prove that the killing was "willful, deliberate, and premeditated." Va. Code Ann. §18.2-32. Therefore, to prove entitlement to a second-degree murder instruction, petitioner would have to demonstrate that the evidence at trial supported a rational finding by the jury that Buchanan did not form an intent to kill each of his four victims before inflicting the fatal wounds upon them. *See Smith v. Commonwealth*, 261 S.E.2d 550, 553 (Va. 1980) (to premeditate means to adopt a specific intent to kill, and premeditation is what distinguishes first and second-degree murder).

On direct appeal, the Virginia Supreme Court addressed the issue of whether the evidence supported a second degree murder instruction as to his father's killing, reviewing in detail Buchanan's various attempts to explain his state of mind and why the killings happened. In the end, the court held:

> We are of the opinion that Buchanan was not entitled to a second degree murder instruction regarding his father's murder. This murder was planned. The only reason it was not carried out the day before was because Buchanan made a conscious decision not to do it at that time. But, the next day, he returned to his father's house prepared to kill and intending to kill. Buchanan did not say he killed in anger. He did not say he

felt provoked. He did not say he shot without thinking. His father had broken off the disagreement and turned his back to walk out the door when Buchanan – having time to think and, by his own admission, intending to kill – shot him in the back of the head. "A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill." *Giarrantano v. Commonwealth*, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980). *See Barnes v. Commonwealth*, 234 Va. 130, 136, 360 S.E.2d 196, 201 (1987); *Bradshaw v. Commonwealth*, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939). Once his father fell, Buchanan shot him between the eyes. In our view, Buchanan relies on but a scintilla of evidence to support his motion for a second degree murder instruction; this is not enough. The evidence to which he points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that Buchanan acted without premeditation.

Buchanan, 384 S.E.2d at 770-71. This court is not bound under §2254 to presume these findings correct, as the issue at stake is a mixed question of law and fact, requiring *de novo* review of both. However, after review of the record, the court fully agrees with the Virginia Supreme Court's findings.

From the physical evidence alone, a jury could not rationally have found that Buchanan did not form an intent to kill each of his victims. All of the victims had multiple wounds; even if an initial wound was inflected unintentionally or in the heat of anger or hurt, his subsequent attacks on each of the victims demonstrate an

intent to kill that victim. After shooting his father, and later Donnie, once in the head, he fired a single, follow up shot into each victim's head at point blank range. When J.J. got up after a shot to the head, Buchanan went in the other room to get a knife and stabbed the boy numerous times until he could no longer get up. Buchanan admitted in statements his intent to kill Geraldine. He covered all trace of the killings in the living-room and paced the floor, waiting for her to come home, his weapons at the ready. He stated, "I wasn't going to leave there until I killed her." And he has never denied wearing rubber gloves the entire afternoon during the killings; this fact alone is a strong indication of premeditation, as the only common sense reason to wear gloves when going to the house was to prevent leaving fingerprints at the scene of an intended crime.

Buchanan's testimony about his state of mind is both inconsistent with his physical acts and insufficient to support a criminal finding of anything less than intent to kill. He testified that he did not plan to kill that afternoon, but also testified to specific planning he and Christianne had done the previous evening. He testified that "it just happened" and that he went "crazy" after killing his father, but the fact that he does not understand his actions now cannot counteract other testimony and physical facts indicating that he had, in fact, formed an intent to kill each victim before inflicting a fatal wound. Buchanan said that he was ready to leave when the boys came home, blocking his escape through the front door, but he did not leave or explain why he could not have left out another door. He admitted that nothing anyone had done "set it off at this particular time." Simply put, the

court is of the opinion that nothing in the evidence provided basis upon which a jury could rationally have found Buchanan guilty of anything less than first degree murder and that Buchanan is not entitled to *habeas* relief on this claim. *Hopper*, 456 U.S. at 611-12.

Claim V: During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

Buchanan admits that counsel failed to submit any instruction to the trial court concerning a definition of transaction or to argue on direct appeal that the court erred in failing to give such an instruction. In denying petitioner's *habeas* appeal, the Virginia Supreme Court expressly held the claim barred under the default rule of *Slayton*. Even if Buchanan contends that the default was caused by constitutionally ineffective assistance of counsel, as he failed to raise these allegations about counsel before the state courts in any proceeding, the ineffective assistance claim is defaulted and cannot serve as cause to excuse the default of the underlying claim itself. *Justus*, 897 F.2d at 713. Thus, this court is barred from addressing Claim V on the merits. *Coleman*, 501 U.S. at 750.

Claim VI: Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

In Claim VI, petitioner asserts that the multiple murder provision of Virginia's capital murder statute is unconstitutionally vague, because it fails to define the

word "transaction." Section 18.2-31 of the Virginia Code provides, in pertinent part:

> Capital murdered defined; punishment. The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> . . .
>
> 7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction.[16]

Buchanan contends that the word "transaction" is susceptible to many different definitions and interpretations. As a result, he claims that the use of the word "transaction" in Virginia Code §18.2-31(7), when applied to his case, violated his Sixth, Eighth, and Fourteenth Amendment rights. Challenging the statute on its face, petitioner argues that the language of the statute encompasses such a broad spectrum of behavior that it does not sufficiently limit the circumstances for which a defendant could become eligible for the death penalty. The Commonwealth responds that the statute was sufficiently clear to have put petitioner on notice that his conduct was prohibited.

The vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness

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[16] The subsections of Va. Code § 18.2-31 were recently renumbered. At the time petitioner committed the murders, the relevant subsection was designated as subsection (g). This subsection was originally added to the capital murder statute in 1981, and was intended to add multiple murders as a crime that qualified for capital treatment. The language of the renumbered section is identical.

that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926)). The United States Supreme Court in *Kolender* further explained that:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U.S. at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 575.

461 U.S. at 357-58. Based on this analysis, the loitering statute at issue in *Kolander* was voided for vagueness because it did not explain what was intended by the requirement that an individual present police officers with "credible and reliable" identification upon being stopped and questioned. *Id.* at 361. "[The statute] is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.*

The Virginia courts have adopted the vagueness standards and rationale of the federal courts. In *Flannery v. City of Norfolk*, 218 S.E.2d 730, 733 (Va. 1975), the Virginia Supreme Court adopted the words of the United States Supreme Court to explain that:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

(quoting *Colton v. Kentucky*, 407 U.S. 104, 110 (1972)). The Virginia court also noted that it would consider whether the words at issue in a vagueness challenge have a well-settled common law meaning and whether the language has been narrowed through judicial decisions. *Id.*

The Virginia Supreme Court applied these standards when it examined the same capital murder provision now challenged by petitioner. In *Woodfin v. Commonwealth*, 372 S.E.2d 377 (Va. 1988), the state court rejected the criminal defendant's contention that the phrase "same act or transaction" as used in the capital murder statute is unconstitutionally vague.[17] An analysis of the statutory

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[17] More specifically, the court in *Woodfin* rejected the facial challenge to the statute outright, concluding that the defendant/appellant had no standing to make such a challenge where he did not contend that his conduct was constitutionally protected or that the First Amendment was implicated. 372 S.E.2d at 379. The court addressed only the narrow question of whether the statute was vague as applied to the defendant/appellant's conduct in that case. *Id.*

language showed that it was sufficient to give an ordinary person notice that his contemplated conduct was forbidden and that the statute did not encourage selective law enforcement. *Id.* at 379. The court stated:

> In the context of this statute, there is nothing uncertain or ambiguous about the phrase "same act or transaction" when applied to defendant's actions. The language is synonymous with "same criminal episode." *State v. Boyd*, 533 P.2d 795, 799 (1975). In other words, two offenses arise out of the "same act or transaction" if they are connected so closely "in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge." *State v. Fitzgerald*, 516 P.2d 1280, 1284 (1973).
>
> In the present case, the evidence shows that two murders were committed at the same location, about the same time, and under the same circumstances. Therefore, given his conduct, the defendant reasonably should have been on notice that the statute applied to his actions when it defined capital murder as killing "more than one person as a part of the same act or transaction." Thus, the statute satisfies the constitutional requirement of definiteness and complies with the standard forbidding arbitrary and erratic law enforcement.

Id. at 379.

Petitioner argues that the holding in *Woodfin* should not influence the vagueness analysis in his case, since *Woodfin* was decided months after petitioner was convicted and sentenced. He asserts that at the time he committed his crimes, the statutory language was unclear

as to what conduct would be considered part of the same "transaction." In short, petitioner contends that because there was no judicial limitation placed upon the statutory language at the time he committed the murders, the statute was unconstitutionally vague as applied to him.

The court rejects this argument, and agrees with the Commonwealth that the language of the statute itself was sufficiently clear to notify the defendant that this course of conduct was prohibited. As the Virginia Supreme Court found during consideration of petitioner's direct appeal, the "four murders were committed at the same place, under the same circumstances, within a narrow time span." *Buchanan v. Commonwealth*, 384 S.E.2d at 771. Therefore, as applied to petitioner, the term "transaction" clearly encompassed all of the criminal acts committed over the time span during which the murders occurred. A person of ordinary intelligence who was in petitioner's position at the time the murders were committed certainly would have understood that the statutory language prohibited those acts. Furthermore, in the situation at hand, there is no support for the proposition that the capital murder statute was enforced in an arbitrary manner. As the court is of the opinion that the Virginia statute passes constitutional scrutiny under the vagueness doctrine, petitioner is not entitled to relief on this claim.

Claim VIIA: Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

In Claim VII of his *habeas* request, petitioner asserts that he was denied due process, assistance of counsel,

and the right to present evidence because the indictments against him were framed in a vague and inappropriate manner. In the first part of this claim, petitioner says that the indictments failed to inform him of what the Commonwealth intended to prove and on which alleged "transaction" it intended to make its case.

Long-established principle holds that an accused must be informed as to the charges against him so that he may prepare his defense and not be taken by surprise at trial. *See Berger v. United States*, 295 U.S. 78, 82 (1935). In addition, an indictment must provide adequate notice of the charges against the defendant so that he may be protected against another prosecution for the same offense. *Id.* It is also well-established, however, that an indictment is sufficient if it sets forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Carll*, 105 U.S. 611, 612 (1881). "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487 (1888). *See also United States v. American Waste Fiber Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987) (indictment must alert defendant and counsel to all necessary elements of offense charged and be sufficiently detailed to be pled in another prosecution to avoid double jeopardy).

Buchanan protests that the capital murder indictments against him were constitutionally insufficient to provide him notice of the charges against him. Petitioner was eventually tried on three separate capital murder indictments. The first indictment (No. 5784) charged petitioner with violating the capital murder statute through the premeditated killing of Buchanan, Sr. "as a part of the same act or transaction of" the premeditated killing of "one or more other persons, to-wit: Joel Jerry Buchanan, Christopher Donald Buchanan, or Geraldine Patterson Buchanan." The second capital murder indictment (No. 5947) included two counts – count one charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Christopher Donald Buchanan; and count two charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Geraldine Buchanan. The third capital murder indictment (No. 5948) also contained two counts – count one alleges that petitioner murdered, in the same transaction, Christopher Donald Buchanan and Joel Jerry Buchanan; and count two alleges that petitioner murdered, in the same transaction, Joel Jerry Buchanan and Geraldine Patterson Buchanan.

Buchanan argues that, because of the manner in which the indictments were framed, he was not sufficiently notified of the charges against which he was asked to defend. Specifically, the defendant asserts that he was not properly notified as to which "transaction" the Commonwealth intended to prove.

As the Virginia Supreme Court pointed out during petitioner's direct appeal, however, the Commonwealth is entitled to charge the commission of a single offense in

several different ways in order to meet the contingencies of proof. *Buchanan*, 384 S.E.2d at 762 (citing *Bryant v. Commonwealth*, 53 S.E.2d 54, 56 (Va. 1949) and R. Bacigal, *Virginia Criminal Procedure* § 13-6 (1983)). In this case, because Buchanan could theoretically have been convicted on two counts of capital murder, each involving two different victims, the Commonwealth was justified in outlining the different possible permutations of "transaction" under which petitioner might have been found guilty. The indictments themselves are adequately clear as to which transactions the Commonwealth was entitled to try to prove. Buchanan was given sufficient notice that he was defending against all of the possible "transactions" described in the indictments. In other words, the indictments alerted petitioner to the fact that the Government had several alternative theories under which it was seeking a capital murder conviction. One theory (shown by indictments no. 5784 and no. 5947) was that petitioner murdered Buchanan, Sr. and one or more of the other victims in the same transaction. This theory encompasses all transactions which involve the killing of Buchanan, Sr. The second theory (contained in count one of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Christopher Donald Buchanan in the same transaction. And another theory (from count two of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Geraldine Buchanan in the same transactions. The court is of the opinion that the indictments very clearly state the different possible transactions, and that the Commonwealth is entitled to pursue alternative theories in a criminal trial. Buchanan was not denied due process, effective assistance of counsel, or the

right to present evidence simply because he was forced to defend against alternate charges.

Claim VIIB: The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the number of indictments.

The second part of petitioner's claim concerning the multiple capital murder indictments against him is that the trial court unconstitutionally limited his defense counsel's opening statement by refusing to allow any discussion of the number of the indictments in the case. Buchanan asserts that this restriction resulted in a denial of due process, the effective assistance of counsel, and the right to present evidence.

The court is of the opinion that this argument is also without merit. Petitioner did not have a constitutional right to give an opening statement, and a trial court has the authority to place restrictions upon subjects to be commented on during opening statements. *See, e.g. United States v. Odone*, 888 F.2d 1014 (4th Cir. 1989) (trial judge attempted to set forth ground rules for opening statements; when one defendant failed to comply, court had the discretion to sever the trial of that defendant); *United States v. West*, 877 F.2d 281 (4th Cir. 1989) (trial court justified in stripping defendant of *pro se* status when he did not follow restrictions placed upon his opening statement); *Arnold v. Eastern AirLines*, 681 F.2d 186 (4th Cir. 1982) (trial court justified in prohibiting comments about the defendant's settlement practices); *United States v.*

Pinkerman, 374 F.2d 988 (4th Cir. 1967) (trial court prohibited government from mentioning defendant's incriminating statements during opening remarks).

It is not the function of the opening statement "to apprise the accused of every aspect of the charges against him – that is done by the indictment." *Butler v. United States*, 191 F.2d 433, 435 (4th Cir. 1950). By the same token, the opening statements of counsel are not intended to inform the jury as to the specific elements of the crimes involved. Rather, opening statements are intended to give the jury an objective summary of the evidence that each side expects to produce. *United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986). At the close of the evidence, it is the function of the trial court to give instructions on the specific findings that the jury must make in order to convict the defendant of a particular charge. The court finds that the restrictions the trial court placed upon the parties' opening statements in this case were within its discretion and did not affect the constitutional rights of petitioner.

Claim VIII: The trial court unconstitutionally denied Buchanan's motion for change of venue.

Part A of Claim VIII, concerning general pretrial publicity, was first raised by petitioner in his motion for change of venue; the claim was properly exhausted when raised on direct appeal and was not procedurally defaulted. However, Part B of Claim VIII is procedurally barred because the issue of false information in the pretrial publicity was not mentioned in Buchanan's motions at trial for change of venue or raised in his direct appeal.

The Virginia Supreme Court noted on direct appeal that Buchanan had not complained of false publicity as a grounds for his venue motion; then, in state *habeas*, the Supreme Court found the venue change claim barred under the rule of *Slayton* to the extent that it raised a matter not asserted on direct appeal. Ineffective assistance of counsel cannot serve as cause for this default, as no allegations concerning counsel's ineffectiveness were raised in the state *habeas* courts to excuse the *Slayton* default and as Buchanan has not offered any explanation for this omission. *Justus*, 897 F.2d at 713.

Likewise, the court is barred under *Keeney* from considering any evidence concerning false information in pretrial publicity as supporting evidence for Part A of the claim, as petitioner argues. 504 U.S. at 8. Simply presenting evidence of the publicity to the state courts was not the equivalent of proving information in that publicity to be patently false and, therefore, prejudicial. Buchanan has not offered any reason for his failure to develop the false information evidence in the trial motions or in the direct appeal; the very fact that the Virginia Supreme Court noted this failure in making its decision on direct appeal suggests that the decision on appeal might have been different if the trial court had been faced with clearly false information in pretrial publicity. This situation is an excellent example of the reasoning behind application of default rules to development of supporting evidence in state court proceedings. If the state courts are not presented with a fair representation of petitioner's claims and all the relevant proof of those claims, they are not being presented with a fair opportunity to correct their own constitutional errors. Because Buchanan failed to

develop his false information evidence before the state trial and appellate courts, this court is barred from considering Claim VIIIB, either as a separate claim or as additional information is support of Claim VIIIA. *Id.* and *Coleman* 501 U.S. at 750.

In Claim VIIIA, Buchanan essentially claims that the court denied him his Sixth Amendment right to an impartial jury because the trial judge refused to grant his motion for a change of venue based on general, pretrial publicity. Buchanan avers that potential jurors in Amerst County had been so inundated by local pretrial publicity, which would prejudice them against him from the start, that the only way for him to receive a fair trial was for the court to grant the venue change.

Where pretrial publicity raises a possibility of jury bias, the court has a constitutional duty to explore through adequate *voir dire* the impact, if any, which such publicity has had on jurors' ability to be impartial. *See Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987). The trial court need not question venire persons on the content of publicity to which they were exposed so long as *voir dire* is adequate to determine if prospective jurors could remain impartial despite pretrial publicity and decide the case only upon the evidence presented to them during trial. *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991). A reviewing court should not easily second guess the trial court's *voir dire* because it is the trial judge who must reach factual conclusions regarding impartiality and credibility by relying on demeanor evidence and responses to questions. *Rosales-Lopez v. United States*, 451 U.S. 182, 188-90 (1981). A trial judge's decision not to change venue, because he believes an impartial jury *can* be

seated, will only be overturned by a reviewing court for "manifest error." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (emphasis added).

There is no evidence provided by petitioner in either the initial petition or any of the papers filed in opposition to the respondent's motion which even hints at a violation of petitioner's right to an impartial jury. Though the trial court acknowledged that there had been some publication of the facts surrounding the murders and the trial of Buchanan's wife, Christianne, Buchanan's prospective jury members, when questioned during *voir dire*, did not exhibit the sort of partiality and pretrial publicity knowledge which would have necessitated a change of venue or which would lead a reviewing court to find that the jury had been tainted. *See Patton v. Yount*, 467 U.S. 1025, 1026 (1984).

Unlike *Shepard v. Maxwell*, 384 U.S. 333, 347 (1966), in which the judge refused to question the venire persons about the effect of media publicity, in Buchanan's case the judge was very careful to ask prospective jurors if they were aware of the case and if they could put aside what they had heard from any other source and decide the matter based solely on the evidence presented at trial. Only two jurors, Donald Hendrick and Albert Hartberger, exhibited an inability to put aside what they had heard about the trial, and they were dismissed for cause by the court. (Trial Tr. 41-45, 154-163). Other jurors evidenced only minimal to moderate knowledge about the events

surrounding the trial, and, to a person, they will said they could put what they had previously heard behind them.[18]

Buchanan points to one lone article detailing his wife's conviction as his proof that venue should have been changed. That showing does not rise to the level at which this court would find that the trial judge abused his discretion when he did not grant the change of venue motion. The evidence shows quite the opposite, in fact, and this court finds that "[s]electing the jury was relatively easy, . . . the publicity was accurate and noninflammatory, and . . . there was no indication [among the venire persons] of 'widespread prejudice.' " *Buchanan*, 384 S.E.2d at 768. Petitioner is not entitled to relief on this claim.

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[18] Of the twelve jurors and two alternates actually seated, Jerry Baker (Tr. 45-63), Strother Snead (Tr. 172), Thomas Cheryba (Tr. 321-22), George Speidell (Tr. 417), Joseph Liggon (Tr. 426), Mark Shrader (Tr. 577), and Linda Laughlin (Tr. 590), were moderately aware of the circumstances surrounding the murder and some were also cognizant that Christianne Buchanan had been convicted a few days earlier as an accomplice to the murder. The other members of the selected jury panel: Thomas Hardy (Tr. 193-94), Myra Ramsey (Tr. 277), Juanita Roberson (Tr. 308-09), Audrey Hudnall (Tr. 438), John L. Smith (Tr. 463-64), Diane Young (Tr. 500), and Margaret Cash (509-10), only exhibited minimal knowledge of the murders and Christianne's trial. Similar patterns can also be seen with the jurors stricken for cause by the court (most of whom were dismissed because of an inability to impose the death penalty) as well as among those who were removed through the use of challenges used by the trial counsel.

Claim IXA: The trial court refused to let defense counsel ask jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

Buchanan argues that the trial court denied him due process by erroneously refusing to allow Buchanan's counsel to ask prospective jurors, "Do you believe that a death sentence is the only appropriate punishment for capital murder?" This claim is without merit. *Buchanan* relied upon *Morgan v. Illinois*, which held that a defendant must be allowed to inquire whether a juror would "automatically vote for the death penalty in every case." 504 U.S. 719, 729 (1992). However, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. *Mu'Min*, 500 U.S. at 424-26. The trial court told Buchanan's counsel, "I don't object to you asking in a different way about whether [the juror] would automatically give the death penalty," and the trial court directly asked the prospective jurors if they could consider voting for a sentence less than death. (Tr. at 234, 253).

Buchanan's counsel agreed that the trial court had asked the questions required by law. (Tr. at 253). The trial court explained that the reasons for disallowing the proposed line of inquiry was the question's argumentative nature. (Tr. at 247-255). The trial judge also objected to proposed questions regarding the "appropriate punishment" for capital murder without explanation of the punishments legally available for capital murder. The trial court explained, "[t]he jury is not considered to be a group of lawyers who know all the legal answers." (Tr. at 291-2). The trial court allowed Buchanan's counsel to ask

clear, re-phrased *Morgan*-type questions of prospective jurors, as demonstrated in the following examples:

> To Mrs. Rhodes:
> "Do you understand that if the defendant is convicted of capital murder that the death penalty is not automatic in those cases? . . . Do you have any religious or personal or ethical beliefs that would require you to vote for the death penalty and not consider life imprisonment?"
>
> To Mr. Cheryba:
> [I]f Douglas McArthur Buchanan, Jr.–that's him, Doug here – is convicted of capital murder, would you feel incumbent to impose the death penalty or would you follow the law and consider each of the criteria as instructed by the court . . . and make up your mind based on the evidence and the law?
>
> To Mrs. Giles:
> Do you understand that the death penalty – even if he is convicted of capital murder, the death penalty is not automatic? . . . You understand that the jury has to listen to all of the evidence, both in his favor and against him, and then decide whether . . . death is the appropriate punishment or life imprisonment is the appropriate punishment? . . . [Y]ou would be willing to consider life imprisonment if you felt like the facts merited that?

The court allowed counsel to ask Mr. Lewandoski the following questions:

> Do you believe if you heard this case and decided, based on the evidence, to impose a life sentence rather than the death penalty that you would be under any pressure from – or that you would catch any hard – ill feelings from the people at work . . . Do you feel like you can consider everything – every factor that comes into evidence in this case and fairly consider the possibility of a life sentence with that pressure in the background [from people at work who felt the only choice for Buchanan's punishment was the death penalty]?"

When Mr. Lewandowski said no to the second question, the court followed up with questions of its own: "What you're saying is that you feel – you would feel an undue amount of pressure from people who would see you after the case was over if you had voted for some punishment that they didn't approve of? . . . So would that affect your decision in the cases, do you think? Do you have some reasonable doubt about it in your mind?" Mr. Lewandowski answered, "Yeah, I think I do. Yes." The court dismissed him from the case immediately. *See* Tr. at 267, 335, 349-350, 371-374.

As these examples make clear, the trial court met the constitutional requirements set out in *Morgan*, 504 U.S. at 729. The Virginia Supreme Court ruled on direct appeal that the trial court had correctly refused the tendered question, *Buchanan*, 384 S.E.2d at 765. The trial court afforded ample opportunity for counsel to ask relevant questions, and the questions actually allowed and asked by the trial court were sufficient to preserve Buchanan's right to a trial by a fair and impartial jury. U.S. Const., amend. VI and XIV.

Claim IXB: The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

As stated above, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. *Mu'min*, 500 U.S. at 424-26. A defendant is constitutionally entitled only to know whether a juror can remain impartial in light of information that juror has previously obtained, not to explore the specific content of the acquired information. *Id.* at 431. "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." *Irvin*, 366 U.S. at 722. The material inquiry in *voir dire* is not whether jurors know details about the case, or even that they have some impressions about what may have happened, based on what they have read or heard. The material inquiry is whether the jurors have "such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035.

Not long into the *voir dire* process, Buchanan's counsel asked Juror Hartberger, "No [sic] what impressions do you have about Douglas' involvement in the case from what you've read? . . . You believe he did it from what you read?" Mr. Hartberger answered, "from what I read, I'd have to say yes. . . . [T]he newspapers, the television and everything has kind of impressed upon me that there's no doubt he's guilty." The court questioned Mr. Hartberger further about whether he could put aside what he had read and judge the case only upon the evidence presented to him at trial. Mr. Hartberger said

that he thought he could. He said, "I've never said that he's guilty. I said if I believed what the newspaper said, then I would assume that he was guilty." The court dismissed this juror for cause, but admonished Buchanan's attorneys not to ask jurors about their impressions of the case or to pose hypothetical questions about what jurors believed about the case based on newspaper reports. Buchanan claims these limitations prevented him from determining whether or not jurors retained the ability to be impartial. He further alleges that the questions asked and allowed by the court suggested the answers jurors should give if they wanted to serve on the jury. (*See* Tr. 153-68)

The court finds no merit to this claim. While the trial court's questions to jurors about pretrial publicity were, for the most part, answerable with a yes or a no, they are precisely the sort of *voir dire* questions which were found constitutionally adequate in *Mu'min* to evaluate juror impartiality.[19] 500 U.S. at 420. From the court's questions,

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[19] The court in *Mu'min* asked the following questions:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case? . . . In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, [do you believe] that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

The court in Buchanan's case asked Mr. Hartberger the following questions:

counsel discovered the specific news media to which each juror had been exposed, if not the specific content of each article or news report he had seen or specific impressions he had gained from them. The court asked numerous questions, from different angles, about the affect [sic], if any, which exposure to pretrial publicity might have on the juror's ability to decide the case on the evidence

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> Now have you read about these cases in the newspaper? . . . And have you heard and seen about them on television? . . . [H]ave you heard anything on the radio? . . . Have you heard the case discussed by other people not in the news media?

After Mr. Hartberger answered in the affirmative to all of these questions, the court asked:

> Now, will such information as you have received from those sources affect your impartiality in this case? . . . Can you try the case based solely on the law and the evidence you hear in court? . . . And not be affected or influenced in any way by what you previously heard or read or seen about the case? . . . Have you yourself expressed or formed any opinion as to the guilt or innocence of the accused? . . . Considering what you have heard or read or seen on television about the case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching any fixed opinion or conclusion as to the guilt or innocence of the accused? . . . Do you have any doubt in your mind? . . . You can try the case based on what you hear in court? . . . Do you know of any bias or prejudice either against the Commonwealth or the accused that you might have? . . . Do you know now of any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused based solely upon the law and the evidence in the case?

presented at trial. The court rephrased each question at least once to be sure the juror understood him and that he understood the juror's response.

After a thorough review of the transcript, this court agrees with the Virginia Supreme Court's assessment of *voir dire* in Buchanan's case:

> The trial court's questions were not leading, but were proper, fair, and evenhanded. Moreover, it appears that Buchanan's so-called open ended nonleading questions were nothing more than efforts to engage prospective jurors in rambling, unspecific, unfocused dialogues far removed from the core concern of *voir dire*, which is to determine whether jurors stand indifferent in the cause."

384 S.E.2d at 765 n.2. *See also Mu'min*, at 420. The trial court did not commit constitutional error in disallowing the tendered questions or in conducting *voir dire*. This claim must be dismissed as meritless.

Claim IXC: The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Buchanan admits that his *Witherspoon* claim was defaulted at trial. The trial court dismissed five jurors for cause, based upon their express opposition to the death penalty in response to the court's *voir dire* questions. Counsel failed to object to any of these dismissals or to

request an opportunity to rehabilitate them. Although Buchanan raised the claim on direct appeal, the Virginia Supreme Court found it barred under Rule 5:25 of the Virginia Supreme Court Rules, based on counsel's failure to rehabilitate, or otherwise object, at trial.[20] Petitioner did argue in his state *habeas* petition that counsel was ineffective during *voir dire* in making and preserving objections to specific actions by the court. Even assuming that this vague reference is sufficient to constitute exhaustion of a claim that counsel were ineffective in their handling of *Witherspoon* jurors, in order to show cause and prejudice for his default, petitioner must first prevail on the ineffectiveness claim itself, by demonstrating incompetence and resulting prejudice as defined in *Strickland v. Washington*. *Murray v. Carrier*, 477 U.S. at 487-89. As the court finds no evidence that any of the five *Witherspoon* jurors could have been rehabilitated, it is the opinion of the court that counsel were not incompetent when they did not seek to rehabilitate those jurors.

Under *Witherspoon* as slightly modified in later cases, a capital juror may be dismissed for cause only if the "juror's views would 'prevent or substantially impair the performance of his duties as a juror." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (modifying *Witherspoon* test). This determination regarding a juror's views need not be made with "unmistakable clarity"; it is sufficient if the trial judge is "left with the definite impression that a

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[20] Rule 5:25 states in relevant part:

> Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling.

prospective juror would be unable to faithfully and impartially apply the law." *Id*. at 426. Neither *Witherspoon* nor *Witt* indicate that the trial judge must withhold his determination about a death-opposed juror until after defense counsel has had opportunity to attempt rehabilitation of that juror. Accordingly, the court is somewhat confused by the phrasing of petitioner's claim, but will assume that petitioner's primary concern is the alleged failure of the trial court adequately to explore the *Witherspoon/Witt* question, whether through additional questions from the court or through questions by defense counsel, in order to ensure Buchanan a fair trial.

As stated, the court finds no evidence that Buchanan was denied a fair trial because the trial court did not question the *Witherspoon* jurors further about their ability to impose the death penalty despite their views against it. Based on the jurors' answers to the trial court's questions, the court is satisfied that the trial court met all *Witherspoon/Witt* requirements before dismissing the jurors.[21]

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[21] Following are relevant excerpts from the trial court's questioning of the five jurors in question.

The Court: In cases involving capital punishment, do you have any opinion such as to prevent your convicting anyone of an offense punishable with death?

. . . .

Mrs. Warrick: No.

The Court: Do you have such an opinion that you could never vote to impose the death penalty in a case? Ma'am?

Mrs. Warrick: No.

Petitioner does not here suggest any specific rehabilitation questions which should have been asked of the

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The Court:	You could never vote to impose the death penalty?
Mrs. Warrick:	No.
The Court:	You could not?
Mrs. Warrick:	No.
The Court:	All right, you're excused. . . .
The Court:	Do you have an opinion such as to prevent your convicting anyone of an offense punishable with death?
Mr. Renalds:	Yes, sir.
The Court:	In other words, if the offense of capital murder under Virginia law is punished with either death or life, if he's convicted of that offense, either a life sentence or death – so you have such an opinion of the death penalty that you would not convict someone of that offense which may be punishable with death? Is that what you say?
Mr. Renalds:	I believe so, sir.
The Court:	All right. You're excused. . . .
The Court:	First, in cases involving capital punishment, do you have any such opinion such as to prevent your convicting anyone of an offense punishable with death?
Mrs. Weigand:	I couldn't.
The Court:	So you couldn't convict anybody if the possibility was life or death?
Mrs. Weigand:	I could not convict anybody if the penalty was death.
The Court:	. . . . [Here, the court explained that capital murder cases are decided in two phases, a guilt phase and a sentencing phase where the two sentencing choices are life or death] And the

jurors before dismissal, and the court can think of none which would not have been redundant or futile; *Witherspoon* does not require the court to badger potential jurors into questioning their firm beliefs against capital punishment. Counsel could reasonably have believed that these jurors could not be rehabilitated, based on their strongly expressed views in opposition to the death penalty. Accordingly, the court finds that Buchanan has failed to demonstrate that his attorneys were incompetent in failing to object to the court's dismissal of the jurors or to

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	question I'm asking you on the guilt part of it or innocence part of it, could you vote for convicting a person of capital murder knowing that when you got to the penalty phase the penalty would either be life or death?
Mrs. Weigand:	No.
The Court:	So you could not convict anyone in a case like that? All right you're excused. . . .
The Court:	Now do you have any opinion such as would prevent your – you from convicting anyone of an offense punishable with death?
Ms. Taylor:	I don't think I could do that.
The Court:	you could not even – you could not convict somebody to begin with of such an offense even though the offense were punishable with life or death?
Ms. Taylor:	I don't think I could, no.
The Court:	So where the death penalty was one possiblity and life sentence was the only other possibility, you don't think you could convict a person of such a crime?
Ms. Taylor:	No, sir.
The Court:	Anyone have any further questions on that point? All right, you're excused, Ms. Taylor.

seek to ask their own rehabilitation questions. Where a petitioner fails to demonstrate incompetence, the court need not inquire into the prejudice prong of the *Strickland* standard; petitioner's ineffectiveness claim fails. 466 U.S. at 697. Accordingly, the court finds the *Witherspoon* claim to be procedurally defaulted and, therefore, barred from further federal review. *Harris*, 489 U.S. at 262.

Claim XA. The trial court failed to sequester the jury.

As with Claim IV, Buchanan raised Claim XA on direct appeal as a matter of state law, but did not allege that the court's omission also violated the United States Constitution or cite any federal case law. On direct appeal, the Virginia Supreme Court treated the claim as one raised under state law and found it meritless. Then, when petitioner raised the claim in state *habeas*, the Virginia Supreme Court found the federal constitutional claim concerning sequestration to be barred, pursuant to *Slayton*. 205 S.E.2d at 682. Under the same analysis as detailed under Claim IV above, the court finds federal review of this claim to be barred by petitioner's procedural default on direct appeal. *Harless*, 459 U.S. at 6-7.

Again, petitioner argues that the court should address the merits of his claim, since the state and federal claims regarding sequestration of the jury are practically identical. Even assuming that Virginia law and federal constitutional law on this issue are similar and that the claim is somehow preserved for federal *habeas* review, the court finds petitioner's claim meritless. Criminal defendants have no constitutional right to a sequestered jury, but they do have the right to a fair trial. In cases where

publicity surrounding a criminal trial is pervasive and prejudicial, the court has inherent power and even a duty to minimize the effects of the publicity on the fairness of the trial through such measures as sequestration of the jury. *See Sheppard*, 384 U.S. at 357-59. In the *Sheppard* case, the United States Supreme Court found the extent of publicity, both before and during trial, was so extreme and so pervaded the trial process that the defendant was denied his constitutional right to a fair trial. The Court specifically found that under the unique media blitz that had surrounded Sheppard's trial, the trial judge should have sequestered the jury on his own motion. *Id.* at 351. To succeed on his sequestration claim, however, Buchanan must show that failure to sequester the jury so affected the fundamental fairness of his trial as to violate due process. *Bowman v. Bordenkircher*, 522 F.2d 209, 210-11 (4th Cir. 1975). The court finds that he has not met this burden.

First, he has not presented evidence indicating that the extent of the publicity in his case reached nearly the proportions of the media interference in the *Sheppard* case or the other cases therein cited in which courts presumed prejudice from media coverage. In Sheppard's case, the media publicized the names and addresses of prospective jurors and, as a result, venire persons received anonymous letters and telephone calls, along with calls from acquaintances, about the upcoming trial. *Sheppard*, 384 U.S. at 342. Before trial, news reports emphasized evidence against Sheppard, pointed out discrepancies in his statements to police, and reported supposed "facts" about him and the case which were never brought out in trial testimony or evidence. One radio station was

allowed to set up broadcasting facilities in the room where jurors rested during court recesses and deliberated. *Id.* at 343. Newscasts originated from this room throughout the trial and during jury deliberations. Outside the courthouse, television and other cameras snapped pictures of the jury and judge; one broadcast included an interview with the judge as he came into the courthouse. Jurors were also photographed during *voir dire* and during trial. Newspapers had access to the daily record of trial proceedings and witness testimony was printed verbatim in local papers, along with objections and judicial rulings. Pictures of jurors appeared more than 40 times in local papers.

On the contrary, Buchanan has not presented to this court any direct evidence of the extent of the media coverage of his trial. In the record, the court found a photocopied article about the killings and Christianne's upcoming trial and a front page newspaper article published after her conviction for first degree murder before the same judge who would later preside over Buchanan's trial; the judge is quoted in the second article as stating that he had no doubt about Christianne's guilt on the first degree murder charges. The second article appeared four days before Buchanan's trial began.[22] Buchanan also asserts that there was daily coverage of the trial in the media, although he presents absolutely no evidence of such coverage or its specific contents.

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[22] The court notes that because Christianne Buchanan's trial was not a jury trial, she could only have been convicted if the judge felt she was guilty beyond a reasonable doubt, as the judge rendered the verdict.

Any capital murder case is bound to engender media coverage, but to prevail in his sequestration claim, Buchanan must present evidence that the coverage affected the fairness of proceedings. Buchanan does not suggest that members of the media interfered with the jurors directly, as they did in Sheppard's case. Nor does he demonstrate that any of information about the killings, which was presented by the media before and during his trial, was not also presented to the jury during trial proceedings.[23] Sequestration would not have prevented the influence the pretrial articles about the case or his wife's trial may have had on potential jurors.[24]

Furthermore, the trial court took steps to ensure that the jury remained impartial. *Voir dire* has been discussed at length above. At the end of court each day of Buchanan's trial, the trial judge admonished jurors to avoid media coverage and conversations with others about the trial. He also emphasized to the jurors that they must decide the case based only upon the evidence presented to them in the trial proceedings. On direct appeal, Buchanan asserted that "[t]here [was] no way for the court to know who the jurors talked to or what papers they read during the six days of the trial." The court finds

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[23] As indicated above, Claim VIIIA, petitioner does claim that false information about a possible financial motive behind the killings did appear in media reports. However, the court cannot consider that allegation in review of this claim or any other claim as petitioner failed to present it to the state courts.

[24] The trial court addressed the influence of this and other pretrial publicity during *voir dire*, as discussed above in the analysis of Claim VIII concerning the court's failure to grant a change of venue based on pretrial publicity.

no indication that jurors disobeyed the judge's daily admonitions concerning media coverage or that they were exposed to any prejudicial media coverage during the trial itself. Finding that petitioner has not presented any genuine issue of material fact concerning his claim that failure to sequester the jury resulted in a fundamentally unfair trial, it is the opinion of the court that no evidentiary hearing on this matter is warranted and that the claim must be dismissed as meritless.

Claim XB: The trial court failed to grant additional peremptory challenges during jury selection.

Respondent does not argue that this claim is defaulted, although petitioner failed to pose this claim specifically as a federal constitutional claim on direct appeal. Buchanan does, however, cite *Gray v. Mississippi*, 481 U.S. 648, 663 (1987), a United States Supreme Court case which addresses a constitutional claim involving, at least indirectly, additional preemptory [sic] challenges in a death penalty case. Citation of this case may be said to "fairly apprise" the Virginia Supreme Court that Buchanan was attempting to raise the claim under both Virginia law and constitutional law; therefore, the court finds this claim to be exhausted and not defaulted under *Harless*. 459 U.S. at 6-7. *See also, Renzi v. Commonwealth*, 794 F.2d 155, 158 (4th Cir. 1986)(designation of due process claim and citation of federal case sufficient to satisfy §2254 exhaustion and meet *Harless* test).

Although *Gray v. Mississippi* does provide reference to a constitutional claim regarding additional peremptory

challenges in a death penalty case, the decision is profoundly unhelpful to Buchanan. The Court in *Gray* did not find a constitutional right to additional peremptory challenges. 481 U.S. at 663. In fact, the Supreme Court found the trial court's exclusion of the venire person in *Gray* to be reversible error. *Id.* Peremptory challenges are not required by the Constitution. *Ross v. Oklahoma* 487 U.S. 81, 88 (1988). The Court in *Ross* stated that peremptory challenges should, therefore, be treated similarly to other potentially state-created rights; thus, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law requires." 487 U.S. at 89.

The Virginia Supreme Court has declared that "[t]here is no basis in Virginia law for additional peremptory strikes." *Buchanan*, 384 S.E.2d at 767; *See also O'Dell v. Commonwealth* 364 S.E.2d 491, 501 (Va. 1988). The trial court did not err in failing to grant additional peremptory challenges to Buchanan. Although Buchanan may have fairly apprised lower courts of a federal constitutional question concerning peremptory challenges, that question is easily answered: there is no separate federal right to peremptory challenges and Buchanan "received that which state law require[d]," in satisfaction of federal due process directives. *Ross*, 487 U.S. at 89.

Claim XI: Imposition of the death penalty constitutes cruel and unusual punishment.

This claim raising a general constitutional challenge to any imposition of the death penalty was not presented to the state courts in petitioner's previous proceedings,

and it is, thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. *See Teague*, 489 U.S. at 298; *Bassette*, 915 F.2d at 935-37.

Claim XIIA: Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on ground of double jeopardy.

Petitioner asserts that his trial counsel was ineffective for failing to advise him to plead guilty to four indictments charging him with first degree murder.[25] Petitioner argues that under Virginia law he had an absolute right to

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[25] A total of fourteen separate indictments were returned against Buchanan. The first four alleged capital murder for killing Buchanan, Sr. and one or more of the other victims in a single transaction. Three of these indictments were later quashed as being redundant of the first. The grand jury then returned two capital murder indictments, each containing two counts which described different possible double murder transactions. Four other indictments charged petitioner with the use of a firearm in the commission of a murder. Finally, four first-degree murder indictments were returned for the individual murders of each of the victims. Petitioner was initially arraigned on the original four capital murder indictments and the four firearms indictments. He was rearraigned just before trial on three capital murder indictments, four firearms indictments, and four first-degree indictments. Petitioner now asserts that he should have been advised to plead guilty to the four first-degree murder indictments and that by doing so, the Commonwealth would have been barred, on double jeopardy grounds, from prosecuting the capital murder indictments.

plead guilty to the whole of any of the indictments against him. If Buchanan had entered a guilty plea to the indictments charging him with first degree murder, he believes, double jeopardy would have prevented the Commonwealth from prosecuting him on the capital charges. The Commonwealth responds that petitioner's understanding of the double jeopardy implications of a guilty plea is faulty in this case, where the indictments on first degree murder and those on capital murder were tried in a single proceeding. Although the court recognizes that the merits of petitioner's double jeopardy argument in the plea context are unclear under current Virginia law, it is of the opinion that counsel were not ineffective for failing to raise this issue or in failing to advise Buchanan to plead guilty at the time this case was tried.

At the outset, it is important to note the standards governing an ineffective assistance of counsel claim. The sixth amendment guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court adopted a two-prong test for determining whether a defendant was denied effective assistance. The first prong is incompetence. Petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. A strong presumption exists that the defendant's counsel acted within his professional discretion and provided reasonable service. A reviewing court will be highly deferential in scrutinizing the performance of counsel. *Id.* at 688-89; *Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991), *cert. denied*, ___ U.S. ___

(1992)(best course for *habeas* court is to credit trial counsel's plausible strategic choices).

The second prong of the *Strickland* test is prejudice. The *habeas* petitioner must be able to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694; *see Hutchins v. Garrison*, 724 F.2d 1425, 1431 (4th Cir. 1983) (burden on petitioner to show prejudice), *cert. denied*, 464 U.S. 1065 (1984); *Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977) (incorrect advice or trial error must be prejudicial).

In this case, determining whether Buchanan was prejudiced by counsel's actions requires an examination of the underlying merits of petitioner's double jeopardy argument. In support of his position, petitioner first points to the case of *Graham v. Commonwealth*, 397 S.E.2d 270, 271 (Va.App. 1990), in which the Virginia Court of Appeals held that the Virginia constitution and laws give a criminal defendant the absolute right to plead guilty to the whole of any indictment against him. The court may reject such a guilty plea only if it believes that the plea was not made intelligently, voluntarily, and knowingly, in accordance with federal Constitutional requirements. *Id.* at 273.[26] Petitioner next relies upon several Virginia state

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[26] In *Graham*, the defendant was charged in a single indictment and initially entered a plea of not guilty. After the Commonwealth had presented its evidence at trial, however, the defendant informed the court that he wished to change his plea to guilty. The court refused to accept the plea, saying that

and federal cases which hold that a guilty plea is the equivalent of a conviction. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927) (guilty plea is a conviction, and like a jury verdict, is conclusive); *Knight v. Johnson*, 529 F.Supp. 1309, 1322 (E.D.Va. 1982) (court should not have required defendant to go through full trial after accepting guilty plea), *rev'd* 699 F.2d 162 (4th Cir. 1983) (court entitled to hear all evidence necessary to understand the case and affix an appropriate sentence), *cert. denied* 464 U.S. 832 (1983); *Hancock v. Slayton*, 341 F.Supp. 436, 439 (W.D.Va. 1972) (because guilty plea is a self-imposed conviction, defendant usually cannot appeal unless it appears the plea was coerced); *Miracle v. Peyton*, 176 S.E.2d 339, 341 (Va. 1970) (a voluntary plea of guilty is a conviction and nothing is left but the imposition of the prescribed punishment). Finally, Buchanan notes that the double jeopardy clause embodies three guarantees, including protection against a second prosecution for the same offense after a conviction. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Based on these principles, he argues that had he pled guilty to the first degree murder indictments, the trial court would have been required to accept his plea, and that conviction would have precluded the Commonwealth from prosecuting the capital murder indictments on double jeopardy grounds.

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the defendant's offer cam too late. 397 S.E.2d at 272. The Court of Appeals reversed, noting that while the United States Constitution did not provide a defendant with the absolute right to plead guilty, The Virginia Constitution and Virginia Code § 19.2-254 did grant defendants that right. *Id.*

The Commonwealth responds that Buchanan's understanding of double jeopardy in this situation is erroneous, and asserts that the United States Supreme Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984), is controlling. In that case, the defendant attempted to plead guilty to several counts of a single indictment. The trial court accepted the guilty pleas to counts that were lesser included offenses of other crimes charged in the indictment, and then granted the defendant's motion to dismiss the remaining charges, reasoning that prosecution of those charges would be barred by double jeopardy. The Supreme Court reversed, stating that the double jeopardy clause was not implicated by continuing prosecution of the charges remaining in the indictment. The Court explained that the defendant had not yet been exposed to conviction on the charges to which he had pled not guilty, and the state had not had the opportunity to marshal its evidence or resources more than once. *Id.* at 501. In conclusion, the Court stated: "[n]otwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the state from completing its prosecution on the remaining charges." *Id.* at 502.

The Commonwealth also points to the decision of the Virginia Court of Appeals in *Rea v. Commonwealth*, 421 S.E.2d 464 (Va.App. 1992). The procedural facts of that case are remarkably similar to the case at hand. The defendant in *Rea* was charged in multiple indictments of first degree murder and capital murder. When arraigned on all of the charges, the defendant pled guilty to three first-degree murder indictments, and not guilty to the

remaining charges, including three counts of capital murder. *Id.* at 466. The court found the guilty pleas to be proper, but decided to defer consideration of the pleas and submit the remaining charges to the jury. *Id.* The jury convicted the defendant of three capital murders, and the trial judge then convicted the defendant, based on his guilty pleas, of three first degree murders.[27] *Id.* The defendant was sentenced to imprisonment for nine life terms plus forty-seven years. On appeal, the court held that double jeopardy protected the defendant from multiple punishments for the same crime and vacated the three first degree convictions and sentences. *Id.* at 468. The defendant also argued on appeal that the court erred by withholding judgment on the guilty pleas, because acceptance of those pleas would have barred the Commonwealth from prosecuting the capital murder charges. *Id.* at 467. The Court of Appeals rejected this contention, however, noting that the defendant had been arraigned on all of the indictments on the same day: "By electing to plead guilty to three charges and not guilty to the remainder, defendant neither 'transformed the single prosecution into two separate prosecutions nor captured for

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[27] In entering the first degree murder convictions based upon the defendant's guilty pleas, the trial court noted that "there were only three victims . . . and accordingly there can only . . . be three convictions of homicide. But . . . this is a case of first impression in . . . Virginia . . . and the Court believes that the matter should be resolved by the Appellate Court *as to the issue of whether his pleas of guilty to first degree murder . . . actually placed him in jeopardy of the capital murder convictions.* And, of course, the Appellate Court [may] vacate the convictions [it] finds . . . [in]appropriate." *Rea*, 421 S.E.2d at 466 n.1 (emphasis added).

himself any special protections against successive prosecutions under the double jeopardy clause.' " *Id.* (citing *Walker v. Commonwealth*, 415 S.E.2d 446, 447 (Va.App. 1992)) (other citations omitted). The court concluded that the defendant's multiple convictions were obtained in a single trial and therefore were not barred by double jeopardy. *Id.* Where multiple convictions are obtained in a single proceeding, only the double jeopardy guarantee against multiple punishments is implicated. *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (where consecutive sentences are imposed at a single criminal trial, the double jeopardy guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense); *Turner v. Commonwealth*, 273 S.E.2d 36, 46-47 (Va. 1980).

Assuming that *Rea* is currently the controlling state law for the facts of the case at hand,[28] Voir dire cannot legitimately argue that he was prejudiced by counsel's failure to suggest a guilty plea on the first-degree murder indictments. *Rea*, along with *Ohio v. Johnson*, suggests that even if petitioner had attempted to plead guilty to the first degree murder indictments, the court would have allowed the Commonwealth to prosecute the capital charges.

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[28] As the *Rea* court made no reference to its previous decision in *Graham*, it is unclear what force the *Graham* holding may have outside of the context of a single indictment. In *Sullivan v. Commonwealth*, 420 S.E.2d 724 (Va.App. 1992), *on rehearing* 433 S.E.2d 508 (Va.App. 1993), the defendant raised a double jeopardy argument similar to the one advocated here. The court did not reach a decision on the issue, however, as they were able to decide the case on other grounds.

Perhaps more importantly, the court notes that neither the *Graham* nor *Rea* decision had been rendered at the time Buchanan was tried. The double jeopardy argument now raised by petitioner in his request for *habeas* relief had no foundation at the time his trial counsel were preparing his defense. Counsel could not have predicted whether the trial court would have accepted the reasoning later adopted in *Graham*, or followed the procedure approved in *Rea*. Indeed, as the Commonwealth points out, *Ohio v. Johnson* was the controlling case on this issue at the time of trial. Based on the principle articulated in that case, counsel could legitimately have believed that a guilty plea by Buchanan would not prevent the Commonwealth from prosecuting the capital murder charges. According to objective measures of reasonableness, then, the court believes that it was not incompetent for petitioner's trial counsel to fail to anticipate an argument that may have been asserted following the rule announced in *Graham*. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law). Since the issue of prejudice is at best unclear, and because the court does not believe counsel acted improperly, Buchanan has failed to meet either prong of the *Strickland* test and is not entitled to relief on this claim.

Claim XIIB: Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no viable excuse for his default of state procedural rules for appeal and *habeas*, this court is also barred from review of the claim. *Teague*, 489 U.S. at 298; *Bassette*, 915 F.2d at 935-37.

Claim XIIC: Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

Buchanan believes that recusal was warranted because the same judge who sat on the bench for petitioner's trial also presided over the trial of petitioner's wife, Christianne Buchanan. Petitioner further claims that the trial judge was quoted in the local newspaper, just days before petitioner's trial began, stating that the jury was justified in finding Christianne Buchanan guilty of first degree murder.

In order to prevail on an ineffective assistance of counsel claim Buchanan would have to show both that his counsel was ineffective and that some prejudice resulted from counsel's defective performance. *Strickland*, 466 U.S. at 687. A justified contention of actual prejudice is therefore, necessary to successfully make out an ineffective assistance of counsel claim. In his state *habeas* petition, petitioner claimed that prejudice attached to his trial because the judge seated jurors who were aware of the publicity and predisposed to reject petitioner's evidence that he was only guilty of second degree murder. That however, is not the assignment of prejudice that petitioner claims in his federal *habeas* petition. Now Buchanan asserts that the trial judge showed his own predisposition to disregard the evidence of second degree murder and prejudice resulted when the trial judge refused to give a second degree murder instruction to the jury.

Such inconsistencies between state and federal collateral appeal petitions lead to a factual default of petitioner's federal declaration of prejudice. *See Keeney*, 504 U.S. at 8. Though both the federal and state *habeas* petition ineffective assistance of counsel claims revolve around the trial judge's statement to the press following Christianne Buchanan's trial and an allegation that the statement somehow prejudiced Buchanan's attempt to argue second degree murder, the allegations of prejudice are quite different. The state petition pointed to the jury as the cause of the problem, and now petitioner raises concerns about the judge's own state of mind. Without any proper claim of prejudice, this claim raised by petitioner fails on its face.

However, even if the claim were not defaulted or if some part of it survived default, petitioner's allegations here would fail on their merits. First of all, as stated earlier, the facts surrounding the murders of Buchanan's father, step-mother, and half-brothers simply did not warrant a second degree murder instruction. Petitioner simply cannot avoid the fact that consideration of a second degree murder conviction was not warranted by either the judge or the jury. Further, by making a statement to the press regarding Christianne Buchanan's guilt the trial judge was not making any determination about petitioner's guilt and petitioner does not claim that the trial judge failed to instruct the jury about considering *only* evidence presented during his trial, nor does petitioner bring forth any evidence to show that the jury was actually tainted by the judge's pre-trial statement regarding Christianne Buchanan's guilt.

With regard to petitioner's claim that his trial was one warranting recusal in the first instance, the court notes that a judge is assumed not to confuse evidence in one trial before him with facts presented in another case. *See Dove v. Peyton*, 343 F.2d 210, 214 (4th Cir. 1965). If petitioner's contention held any weight, judicial recusal would be required in any set of cases in which multiple defendants were tried separately and such a far sweeping rule has never been adopted by any court. *See id.* In addition, matters of judicial bias arising from public interest in a case are largely matters of state legislative concern and generally do not rise to the level of federal constitutional proportions. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

If Buchanan had any basis for seeking his trial judge's recusal based on the facts presented, it would have arisen under Virginia statutory or case law. In Virginia, judicial recusal is almost always a matter of discretion. *Justus v. Commonwealth*, 283 S.E.2d 905, 908 (Va. 1981), *cert. denied*, 455 U.S. 983 (1982), and public attention to a case is not a sufficient reason to warrant judicial recusal even when public pressure seeking the death penalty is brought to bear on the judge. *Royal v. Commonwealth*, 458 S.E.2d 575, 580 (Va. 1995).

Petitioner cannot make out any claim here. The proper application of *Keeney* leaves him without a declaration of prejudice on which to base his ineffective assistance of counsel claim. However, even if petitioner were left with any sort of contention that the trial judge's statement to the press regarding Christianne Buchanan's conviction somehow, in and of itself, prejudiced his own trial, whether because of the judge's actions or the jury's, that claim is completely insupportable on the merits as set forth above.

Claim XIID: Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

Buchanan claims that as a result of counsel's acceptance of the jury, some jurors were "improperly seated" and that counsel's waiver prejudiced his appeal to the Virginia Supreme Court. This allegation is meritless. As direct support for his claim of improperly seated jurors,

petitioner points to Juror Cecil Banton. However, this juror was not among the fourteen venire persons ultimately seated on the jury (Tr. 609),[29] and there is no indication in the record that he, or any person who actually became part of the seated jury, would automatically "vote for death if given a choice of punishments," as Buchanan alleges in his petition. In fact, Mr. Banton, in response to questioning by the defense counsel, said "I would follow the court and make up my own mind." (Tr. 133). Further, James Jedelsky was the only juror who actually indicated he might "vote for death" in the fashion contended by Buchanan in his petition. Mr. Jedelsky was excused for cause by the trial judge because he exhibited a strong feeling in support of the death penalty and indicated he might inject his feelings about the escalating crime rate into petitioner's trial (Tr. 545-46). Thus, the court finds no indication that any seated jurors were unacceptable in the manner petitioner alleges and, accordingly, that counsel were not ineffective for stating, in the jurors' presence, that the jury was "acceptable." *See Strickland*, 466 U.S. at 689 (court will be deferential to

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[29] Counsel for defense used a peremptory challenge to remove Juror Banton from the venire. Petitioner argues in his *habeas* pleadings that "it is prejudicial error [under Virginia law] for the trial court to force a defendant to use the peremptory strike afforded him . . . to exclude a venireman who is not free from exception." *Justus v. Commonwealth*, 266 S.E.2d 87, 90 (Va. 1980). Yet, Buchanan's present claim focuses on counsel's ineffectiveness in failing to make and preserve objections to the jurors in the first place, not upon the errors of the trial court. Thus, the court will not address the court's alleged error in regards to the use of a peremptory challenge to remove Mr. Banton.

performance of counsel in order to balance distorting effects of hindsight).

In addition, counsel's decision to state that jurors were acceptable to Buchanan was part of a tactical strategy. Counsel had contacted the National Association of Criminal Defense Lawyers and the Southern Poverty Law Center before Buchanan's trial to ask for advice about defending a capital murder trial. The materials these organizations provided to Buchanan's counsel included a recommendation that the defendant should participate in selection of jurors and that jurors to whom counsel had previously objected should be told directly that the defendant "accepts" them as jurors to try his case, in an effort to encourage jurors' commitment to a fair evaluation of the evidence. Petitioner argues that this strategy had no factual basis because the jurors themselves had not heard counsel's previous objections. The court finds the strategy to be a reasonable attempt to influence the jury toward fairness in Buchanan's case. In any event, the court cannot second-guess a reasonable strategic decision by counsel, *see Stamper v. Muncie*, 944 F.2d 170, 177-78 (4th Cir. 1991), especially where the court finds no indication that Buchanan's right to an impartial jury was prejudiced in any way by counsel's statement. This claim must be dismissed as meritless.

Claim XIIE: Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

Counsel's statement allegedly made on April 26, 1988, the day the trial began, that Buchanan was guilty of

either capital or first degree murder, does not make out an ineffective assistance of counsel claim. Buchanan asserts that counsel's statement before trial, which was quoted in the papers, could have prejudiced the non-sequestered jury and denied him a fair trial. Petitioner essentially argues that he was entitled to have the jury consider a second degree murder charge, *see supra*, and counsel's statement made on the eve of trial prejudiced the jury against making such a determination. There are two ways the alleged prejudice may have attached to petitioner's trial: 1) the jury may have decided the case based on the pre-trial statements of counsel, not the evidence presented during the case, or 2) counsel's statement may have prejudiced the defendant's request for a second degree murder charge. First, the record clearly demonstrates that the defense, in its opening statement, explained that petitioner killed his family (Tr. at 639-55). At the conclusion of the opening statement the defense attorney explained that if each murder was separate from the others and not part of the same transaction, they should come back with four first degree murder verdicts. Thus, even if the jurors were aware of counsel's alleged pre-trial statement to the press, they heard essentially the same thing during defense counsel's opening address and there was no resulting prejudice.

Nor can petitioner show any prejudice attached to his request for a second degree murder charge as a result of his counsel's pre-trial statement. As noted in the analysis of Claim IV, the trial court determined that Buchanan was not entitled to a second degree murder based on the evidence presented at trial. This court agrees with the

trial court and the Virginia Supreme Court's determination that there were no significant facts supporting giving the lesser charge. *Buchanan*, 384 S.E.2d at 769; *Hopper v. Evans*, 456 U.S. at 611 (Virginia and federal standard both require instructions on lesser included offenses only where evidence supports a rational finding of that offense by factfinder). In Virginia, a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." *Clark v. Commonwealth*, 257 S.E.2d 784, 789 (1979), *cert. denied*, 444 U.S. 1049 (1980). Neither the law of Virginia, nor the facts, supported giving a second degree murder instruction to the jury. Thus, Buchanan has failed to make an adequate showing of prejudice on either ground and is not entitled to relief on Claim XIIE.

Claim XIIF: Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

Petitioner also argues that his trial counsel was ineffective for failing to object to Mr. Meeks' prosecution of the case. The Commonwealth Attorney had previously represented Buchanan's grandparents against his father in contested visitation proceedings involving Buchanan in 1984 (2/17/94 Tr. 1).[30] The grandparents alleged during the custody proceeding that petitioner was being

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[30] Although petitioner claims that the Commonwealth's Attorney, Mr. Meeks, represented him in juvenile court when he

abused and that led him to run away from home on several occasions. Mr. Meeks explained the situation to the trial judge and to petitioner's trial counsel. Buchanan's trial counsel examined the record and determined that there was no conflict and the trial judge did not perceive a problem with Mr. Meeks' representation of the Commonwealth (2/17/88 Tr. 2).

This court cannot say that the defense counsel's acceptance of Mr. Meeks' representation of the people constituted anything other than valid trial strategy under *Strickland*. In addition, while a prosecutor's participation in a case has been found prejudicial if he has represented the defendant in the past, *See United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986), Mr. Meeks' role in legal proceedings involving Buchanan was much more attenuated and did not rise to the level of constitutional concern. If anything, counsel could reasonably have believed that the Commonwealth Attorney's awareness of petitioner's difficult childhood would only help Buchanan's situation. Douglas Buchanan admitted to killing his family and only wished to persuade the jury that the killings were: 1) a set of separate occurrences and not one "transaction," and 2) committed in the heat of passion. In order to prove the latter during the sentencing phase, Buchanan put on evidence about his mother's death and his stepmother's treatment of

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was a runaway, state *habeas* proceedings indicated that Meeks' representation of Buchanan's maternal grandparents was his only professional connection to Buchanan's previous court appearances. Buchanan offers no evidence to the contrary in his present petition.

him. Mr. Meeks was aware of all that and the sympathy such knowledge would engender could only have helped petitioner at trial.

Further, the only specific "fact" of prejudice which petitioner brings forth deals with Mr. Meeks' cross examination of Buchanan's aunt, Audrey Bowling, at the change of venue motion of February 17, 1988. Ms. Bowling was testifying regarding the adverse publicity the case had received and appeared as a witness for the defense in favor of changing venue. (2/17/88 Tr. 5-14). However, Mr. Meeks asked only one question which had anything to do with the prior custody disputes: "Weren't you a participant in the custody – in the fight for the custody, I believe you were a witness in that, weren't you?" (2/17/88 Tr. 12). That inquiry was intended only to bring out Ms. Bowling's bias in favor of her nephew and could have been asked by any other Commonwealth's attorney. Mr. Meeks' participation in the earlier custody dispute simply did not provide him with a "leg up" in Ms. Bowling's examination, as petitioner alleges. According to petitioner's own statement of the arguments supporting this court's grant of the writ, then, this court can find no prejudice under *Strickland* because Mr. Meeks' cross examination of Ms. Bowling at the change of venue motion was not substantially enhanced by his previous representation of Buchanan's grandparents in the custody dispute. 466 U.S. at 689.

Claim XIIG(1): Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. *See Teague*, 489 U.S. at 298; *Bassette*, 915 F.2d at 935-37.

Claim XIIG(2): Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

Buchanan also asserts that his counsel were ineffective in failing to object to the trial court's order that the report of defense psychiatrist Dr. Robert Brown be turned over to the Commonwealth and its expert witnesses prior to the sentencing phase of his trial. Buchanan also complains that his counsel failed to demand a simultaneous exchange with the report of the Commonwealth's expert witnesses.

The same standards for determining ineffective assistance of counsel applicable to trial also apply to claims of ineffective assistance at the penalty phase of a capital trial. *Strickland*, 466 U.S. at 686. Accordingly, assessing the conduct of counsel here requires an effort to eliminate the distorting effects of hindsight, and an attempt to understand the conduct from the attorneys' perspective at the time their decisions were made. *Id.* at 689. Buchanan has the burden of showing that the actions of counsel were both incompetent and prejudicial according to the *Strickland* interpretation of those terms.

The Commonwealth establishes that the conduct of petitioner's trial counsel was neither incompetent nor prejudicial. Respondent points to Va. Code Ann. §19.2-264.3:1D, which requires a criminal defendant who wishes to present psychiatric or psychological evidence as a mitigating consideration during the penalty phase of a capital murder trial to provide the Commonwealth "the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation. . . . " Likewise, subsection F of Virginia Code section 19.2-264.3:1 requires a criminal defendant who wishes to use psychiatric evidence to submit to an evaluation by experts for the Commonwealth. After the Commonwealth's experts perform their evaluations, they are required to report their findings to the attorneys for the Commonwealth and for the defense. Va. Code Ann. § 19.2-264.3:1F(1).

The actions of defense counsel in the present case demonstrate that they were aware of the provisions of the

Virginia statute and reasonably assumed that an objection to the trial court's order to turn over Dr. Brown's report would easily be overruled. Also, the record indicates that the Commonwealth did request its experts to conduct an evaluation of the defendant, and that the experts sent their findings to the Commonwealth's Attorney and to the attorneys for the defendant approximately one week before the sentencing phase of the trial was conducted. The actions by the court, the Commonwealth, and Buchanan's trial attorneys show that all parties complied with the law of Virginia. Buchanan's arguments that his attorneys were incompetent in failing to do otherwise is without merit. Further, given the circumstances and the requirements of Virginia law, petitioner cannot effectively argue that he was prejudiced by the conduct of his trial counsel on this issue. Petitioner is not entitled to *habeas* relief based on this claim.

Claim XIIH: Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

The court finds that Buchanan was not deprived of adequate representation because of his attorneys' alleged failure to obtain the written guilt phase verdicts before the sentencing phase of the bifurcated trial commenced. Apparently, petitioner harkens back to the fact that the trial jury found him guilty of *both* the single capital murder of Douglas McArthur Buchanan, Sr., Joel Jerry Buchanan, Christopher Donald Buchanan, and Geraldine Patterson Buchanan, as well as four first degree murders

for each of the victims individually. Buchanan contends that the jury's verdict violated his Fifth Amendment right to be free from multiple punishments for the same offense. Counsel's alleged ineffectiveness is contended to have arisen from petitioner's trial counsel failing to cure the verdict "defect" before Buchanan was sentenced to death by the jury.

Any defect resulting from petitioner's conviction of both the greater capital offense and the lesser murder charges was cured by the courts of the Commonwealth. *See Buchanan,* 384 S.E.2d at 772. Petitioner was simply never entitled, at any time, to pick and choose among the several jury verdicts – "keeping" the first degree murder convictions and "throwing out" the one for capital murder. When a defendant is convicted of lesser included offenses and a greater offense at the same trial, the proper remedy under Virginia and federal law is to vacate both the conviction and sentence of the lesser included offense while leaving in place the conviction for the greater crime. *Brown v. Commonwealth,* 279 S.E.2d 142, 145 (Va. 1981), *citing United States v. Buckley,* 586 F.2d 498, 505 (5th Cir. 1979). The Virginia Supreme Court has already corrected the situation by vacating the first degree murder conviction for the killing of petitioner's father. *Buchanan,* 384 S.E.2d at 773. Thus, even if everything Buchanan contends is true about counsel's deficient performance, the correction made by the state supreme court leads to the conclusion that petitioner has suffered no prejudice under *Strickland.*

Claim XIIIA: The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

At the end of his petition, Buchanan alleges that the court and the prosecution committed several other constitutional violations. Included in these claims is petitioner's assertion that the trial court violated his sixth, eighth, and fourteenth amendment rights when it refused to allow petitioner to undergo additional neurological testing following the trial and sentencing phase of the capital murder conviction. Specifically, Buchanan sought at his sentencing hearing[31] to be tested for a rare form of epilepsy that some psychologists believe may be linked to abnormal and violent behavior in young people. He now claims that the trial court's denial of his request to undergo testing for this particular disorder unconstitutionally deprived him of potential mitigating evidence.

The Commonwealth retorts that a criminal defendant does not have a federal constitutional or state statutory right to "shop around" for an expert that will present the most favorable opinions. *See Pruett v. Thompson*, 771

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31 Buchanan's sentencing hearing was conducted on August 19, 1988. At that time, the court considered the pre-sentencing report that was prepared for all the convictions other than the capital murder conviction, and the post-sentencing report regarding the capital murder conviction. Petitioner's trial counsel presented a motion for additional neurological testing, arguing that the court's ruling on the motion could affect its consideration of both the pre-sentencing and the post-sentencing reports.

F.Supp. 1428, 1441 (E.D.Va. 1991); *see also Poyner v. Murray*, 964 F.2d 1404, 1418-20 (4th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 419 (1992) (attorney's failure to look for psychiatrist willing to testify to psychological disorder does not constitute ineffective assistance). The government also explains that in this case, Buchanan underwent a complete neurological examination and diagnosis prior to his trial. Petitioner's request for additional testing was based upon an article in the *American Journal of Psychiatry* that was published shortly after his sentencing. The article was admitted into evidence during petitioner's sentencing hearing. Petitioner's psychiatric expert also testified at the sentencing hearing that the opinion expressed in the article – the idea that temporal lobe epilepsy may produce violent behavior in young people – is a controversial position among experts on epilepsy. Given this background, the Commonwealth asserts that the issue presented by petitioner is an evidentiary matter only, and does not raise a federal or constitutional issue.

Petitioner argues that he should have the opportunity to present all of the possible mitigation evidence available to him. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, J.) (because the death penalty is qualitatively different than other forms of punishment, the sentencer should not be precluded from considering any aspect of the defendant's character, record, or circumstances of the offense as a mitigating factor). Petitioner also relies upon *Ake v. Oklahoma*, 470 U.S. 68 (1985) in asserting that the court's refusal to permit the additional psychological testing was a violation of constitutional rights.

The *Ake* case, however, involved circumstances markedly different from petitioner's situation. In that case, the defendant was suspected of suffering from a severe mental illness. Following the defendant's arraignment, the court ordered him to be examined by a psychiatrist to determine whether he was competent to stand trial. 470 U.S. at 71. The defendant was initially deemed incompetent to stand trial, but when a course of drug treatment was administered, the defendant stabilized and proceedings against him were resumed. *Id.* at 71-72. The defendant's attorney informed the court that he wished to pursue an insanity defense, and requested that the court arrange for a psychiatrist to examine the defendant. *Id.* at 72. The trial court refused, and the defendant was convicted of two counts of first degree murder and two counts of shooting with the intent to kill. *Id.* at 72-73. At the sentencing phase, the government presented the testimony of the state psychiatrists who had conducted the initial examination of the defendant following the killings. Those experts testified as to the defendant's future dangerousness. The defendant did not have expert psychiatric testimony to rebut this evidence or to present evidence in mitigation. *Id.* at 73. The United States Supreme Court took up the issue of whether the defendant should have been provided with a psychiatric examination on the defendant's direct appeal. The Court reversed the conviction, holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74. In arriving at its

conclusion, the Court reasoned that criminal defendants should have a fair opportunity to present his defense, and that a state's interest in conserving state funds should not come at the expense of fair and accurate criminal proceedings. *Id.* at 83. The Court did limit its holding, however, to cases in which the defendant's mental condition is seriously in question. *Id.* Where the defendant's mental condition is at issue, the Court found that the defendant should be "fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

In the present case, the court is of the opinion that the requirements of *Ake* were met when Buchanan received a complete psychiatric examination and diagnosis before going to trial. The psychiatric assistance provided to Buchanan allowed him to determine the viability of an insanity defense, and permitted him a fair opportunity to present mitigating evidence during the sentencing phase of his trial. *Ake* does not require the state to provide criminal defendants with unlimited opportunities to explore any and every psychological condition that could potentially produce mitigating evidence.[32] In this case, the court believes that Buchanan had

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[32] In fact, the *Ake* Court specifically determined that its "concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel, we leave to the States the decision on how to implement this right." 470 U.S. at 83. In this case, the Virginia Supreme Court determined on direct review that the trial court did not abuse its discretion in denying additional testing; this court assumes that this decision reflects the law of Virginia.

a fair opportunity to present the jury with enough evidence of his mental condition to allow it to make a reasonable determination of sentence.

Also as part of this claim, petitioner makes the bald assertion that the trial court denied him his constitutional rights by refusing to allow Dr. Jerome G. Miller to testify as to the interviews he had conducted in preparing his evaluation of Buchanan. The court also refused to allow Dr. Miller to testify on the medical positions and writings of Dr. Jonathan H. Pincus, who authored the article in the *American Journal of Psychiatry* about the potential effects of temporal lobe epilepsy, and refused to admit letters written to Dr. Miller from Dr. Pincus and Dr. Breeshire. Buchanan argues that, as a result, he was unconstitutionally denied the right to present mitigating evidence at his sentencing hearing. The record reflects, however, that both Dr. Miller and Dr. Brown were allowed to testify as to their observations about Buchanan and to give their opinions on whether additional testing was likely to uncover further mitigating evidence. The evidence that was excluded by the trial court consisted of hearsay statements and the opinions of other doctors who had never examined petitioner. The court is of the opinion that this evidence was not itself evidence of mitigation, and that Buchanan was able to present all the reliable and relevant mitigation available to him at the sentencing hearing. The trial court's evidentiary decisions in this case did not deprive petitioner of his constitutional rights.

Claim XIIIB: The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.

Buchanan raises this claim under the Eighth Amendment, which bars arbitrary and capricious imposition of the death penalty and prohibits procedures which needlessly undermine the reliability of the capital sentencing process. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (special need for reliability in capital case; *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Gregg*, 428 U.S. at 189. Buchanan argues that withholding information about his parole eligibility left the jury with a distorted view of the penalty choices, making their decision for death unreliable.[33] In the absence of the requested instruction, he contends, the jury could have formed the impression that if they did not sentence Buchanan to death, he would soon be out in society again.

The court finds no merit to Buchanan's Eighth Amendment claim. The United States Supreme Court has held that federal courts generally must defer to a state's determination about what a jury should and should not be told at sentencing about the defendant's prospects for parole, pardon or sentence commutation. *California v. Ramos*, 463 U.S. 992, 1013-14 (1983). And as the Virginia

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[33] Had Buchanan received four life sentences for the murders under the law in force at the time of the killings, he would likely not have been eligible for parole consideration until he had served at least twenty years in prison. *See* Va. Code Ann. §53.1-151(D).

Supreme Court noted in affirming Buchanan's death sentence on direct appeal, Virginia juries are to impose an appropriate sentence under the applicable criminal statutes without regard for what might happen to that sentence later, such as possible sentence commutation or parole release. *Buchanan*, 384 S.E.2d at 774. *See also Poyner v. Commonwealth*, 329 S.E.2d 815, 828, (Va.), *cert. denied*, 474 U.S. 865 (1985); *Turner v. Commonwealth*, 273 S.E.2d 36, 47 (Va. 1980). This Virginia rule precluding jury consideration of parole in sentencing has been upheld by the United States Court of Appeals for the Fourth Circuit against constitutional challenge in cases similar to Buchanan's.[34] *See Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990) and *Turner v.*

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[34] In their discussions of this claim, both parties have mentioned *Simmons v. California*, 114 S.Ct. 2187 (1994). The court does not find this case to be controlling of the relevant issues in Buchanan's case. Although the United States Supreme Court, in *Simmons*, recognized a limited, due process right to a parole ineligibility instruction in capital sentencing, only two justices on the *Simmons* court would have found an Eighth Amendment right to the instruction in all death penalty cases, while six justices noted the continued viability of *California v. Ramos* and the right of the state in most cases to determine proper jury instructions on parole eligibility. 114 S.Ct. at 2196, 2200 (O'Connor, J., concurring).

Buchanan's case is also factually distinguishable from *Simmons*. If sentenced to life instead of death, Simmons would never have been eligible for parole, and the jury specifically found future dangerousness as the aggravating factor making Simmons eligible for the death sentence. *Simmons*, 114 S.Ct. at 2190-91. Buchanan, on the other hand, would have been eligible for parole in approximately thirty years on multiple life sentences, and the jury in his case was not even instructed on future dangerousness as a possible aggravating factor.

Bass, 753 F.2d 342, 354 (4th Cir. 1985), *rev'd on other grounds sub nom Turner v. Murray*, 476 U.S. 28 (1986).

In any event, the court finds no basis upon which the jury was misled by the lack of the desired instruction in Buchanan's case. Had the jury sentenced Buchanan to life instead of death, he *would* have been eligible for parole and, although twenty years imprisonment is a long time, he was a young man at the time of sentencing, only twenty years old. The common sense interpretation of "life sentence" left to the jury in the absence of a specific instruction about Buchanan's parole eligibility may have benefited Buchanan, letting the jury speculate that four life sentences plus the years on the firearms offenses would keep him in prison until he was an old man. Moreover, the jury imposed the death penalty based on its finding that the murders were vile, not on a finding that Buchanan was a future danger to society. As parole release is only relevant to the aggravating factor of future dangerousness, it is inconceivable that knowing Buchanan's parole eligibility would have changed the jurors' minds about the vileness of the crime. This claim must be dismissed accordingly.

Claim XIIIC: The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.

Counsel wanted to make a general statement to the venire persons about the *voir dire* process, but the trial court refused their request. This claim does not withstand the respondent's motion. The only real issue with respect

to jury panel questioning is whether the trial judge's *voir dire* was sufficient to impanel an impartial jury. *United States v. Larouche*, 896 F.2d 815, 830 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990). Further, defense counsel were presented with an adequate opportunity to engage the venire persons themselves. At Buchanan's trial both sides were permitted to question the prospective jurors individually, and at length. In addition, there is no constitutional requirement that a trial judge submit any specific form or other statement proffered by the defense counsel to the jury. *See United States v. Bakker*, 925 F.2d 728, 733-34 (4th Cir. 1991). Thus, this claim fails on its merits as well.

Claim XIIID: Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of *Slayton*. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, *Justus*, 897 F.2d at 713, Buchanan has failed to show cause for his default of this claim, and this court is barred from considering it on the merits. *See Coleman*, 501 U.S. at 750.

XIIIE. Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of *Slayton*. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, *Justus*, 897 F.2d at 713, Buchanan has failed to show cause for his default of this claim, and this court is barred from considering it on the merits. *See Coleman*, 501 U.S. at 750.

Buchanan has moved for discovery of these tapes. However, inasmuch as the court has found the claim to be barred from federal *habeas* review, the court also finds discovery in conjunction with this claim to be unwarranted. Buchanan's discovery motion must be denied.

V. CONCLUSION

In accordance with the foregoing, it is the opinion of the court that the Commonwealth's motion to dismiss must be granted and that Buchanan's petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, must be denied. After full review of the record and arguments, the court finds petitioner's claims to be either procedurally barred from review by this court or without merit. Because no genuine issues of material fact remain in dispute, the court finds no justification for an evidentiary

hearing. As petitioner is not entitled to relief upon any claim presented, the entire petition must be denied. An appropriate order shall be entered this day.

Petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such extended period at the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to petitioner and to counsel of record for respondent.

ENTER: This 25th day of January, 1996.

/s/ James C. Illegible
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOUGLAS MCARTHUR BUCHANAN, JR.,
Petitioner-Appellant,
v.
RONALD J. ANGELONE, Director, Virginia Department of Corrections; COMMONWEALTH OF VIRGINIA,
Respondents-Appellees.

No. 96-4

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.
(CA-93-306-R)

Argued: October 30, 1996

Decided: December 30, 1996

Before HALL and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

BUTZNER, Senior Circuit Judge:

In 1988, Douglas McArthur Buchanan, Jr., was convicted of capital murder in Virginia and sentenced to death. After exhausting his state remedies, he petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, he alleged numerous

constitutional defects in the state court proceedings. The district court denied the petition. On appeal, Buchanan presents five issues for review. After careful consideration of his contentions and the record, we find no reversible error and affirm the district court's disposition.

I

On the afternoon of September 15, 1987, Buchanan murdered his father, his stepmother, and his two half brothers. The Virginia Supreme Court's opinion recounts the details of the crime. *Buchanan v. Commonwealth*, 238 Va. 389, 394-96, 384 S.E.2d 757, 760-61 (1989).

Buchanan was charged with capital murder for the killing of "more than one person as part of the same act or transaction." Va. Code Ann. § 18.2-31(7) (Michie 1996). In four separate indictments, the grand jury also charged him with the first degree murder of each victim. In addition, he was charged with four counts of use of a firearm in the commission of a murder.

Buchanan pleaded not guilty to all charges. He was tried before a jury in the Circuit Court for Amherst County, Virginia. The jury found him guilty of capital murder for killing his father, four first degree murders, and the firearm offenses. Following a separate hearing, the jury sentenced Buchanan to death for the capital murder, to life in prison for each of the first degree murders, and to a term of imprisonment for the firearm offenses. The circuit court imposed the recommended sentences.

Buchanan appealed to the Supreme Court of Virginia. The court vacated the redundant conviction of first degree murder for the killing of Buchanan's father and affirmed the other convictions and the related sentences, including the death penalty. *Buchanan*, 238 Va. at 418, 384 S.E.2d at 774. The United States Supreme Court denied certiorari. *Buchanan v. Virginia*, 493 U.S. 1063 (1990).

Buchanan then petitioned for a writ of habeas corpus in the Circuit Court of Amherst County. After the circuit court dismissed his petition, he appealed to the Supreme Court of Virginia, which also denied the petition. The United States Supreme Court again denied certiorari. *Buchanan v. Murray*, 506 U.S. 988 (1992).

Buchanan sought a writ of habeas corpus in federal district court, which denied relief. On appeal, Buchanan now asserts five claims, one relating to the competence of his trial counsel, three alleging errors in his trial, and one challenging the adequacy of the Virginia Supreme Court's appellate review.

II

Buchanan's first claim is that the sentencing jury was inadequately instructed about mitigating evidence. With regard to mitigation, the court told the jury: "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment." In addition, the statutory verdict form required the jury to indicate that it had "considered the evidence in mitigation of the offense."

At trial Buchanan asked the court to give a more detailed instruction on mitigation. Specifically, he asked the court to tell the jury that it should consider as mitigating factors his youth, his clean criminal record, and whether he was "under the influence of extreme mental or emotional disturbance" when he committed the crime. Each of these factors is designated as mitigating evidence by Virginia Code § 19.2-264.4 (Michie 1996). During the sentencing hearing Buchanan submitted evidence supporting each factor, and Buchanan's counsel was permitted to discuss the factors in his closing argument.

Buchanan now argues that the trial court's failure to instruct the jury about the specific mitigating factors supported by his evidence violated his constitutional rights in two ways. His first argument rests on the Eighth Amendment. In his view, the trial court's nonspecific instruction did not appropriately channel the jury's discretion so as to avoid an arbitrary or capricious outcome.

The Eighth Amendment requires that a capital sentencing jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). To accomplish this purpose, a capital sentencing jury must be properly instructed. *Walton v. Arizona*, 497 U.S. 639, 653 (1990). However, the Eighth Amendment does not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

Guided by those constitutional principles, this court has previously analyzed and rejected the argument now asserted by Buchanan. In *Clozza v. Murray*, we held that Virginia's death penalty scheme survives constitutional scrutiny, despite its "failure to instruct the jury on statutory mitigating factors." 913 F.2d 1092, 1105 (4th Cir. 1990). In addition, this court has reviewed and approved the constitutionality of jury instructions, used in other Virginia death penalty cases, that were essentially identical to the instructions contested in this case. *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991); *Briley v. Bass*, 750 F.2d 1238, 1248-49 (4th Cir. 1984).

In its verdict, the jury, as required by Virginia Code § 19.2-264.4, certified that it had "considered the evidence in mitigation of the offense." In *Jones*, we concluded that "[b]y allowing the jury to consider all relevant mitigating evidence, [Virginia's sentencing] procedure . . . satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases." 947 F.2d at 1120. In light of this precedent, Buchanan's Eighth Amendment claim must fail.

Buchanan's second argument asserts a federal due process violation. According to Buchanan, the trial court's nonspecific mitigation instruction was inconsistent with Virginia's death penalty sentencing statute and, as a result, denied him the benefit of the Commonwealth's statutory sentencing scheme. Buchanan argues that this alleged violation of state law infringed his rights under the Due Process Clause.

It is true, at least in the context of discretionary sentencing by a jury, that denial of a state procedural

right may rise to the level of a federal due process violation. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). However, there was no such violation in Buchanan's case because, contrary to his assertion, the trial court's instruction was consistent with the sentencing statute. The statute establishes a capital defendant's right to present mitigating evidence during the sentencing hearing. It neither imposes nor implies an obligation to instruct the jury about specific mitigating factors. Va. Code Ann. § 19.2-264.4.

Our reading of the statute is consistent with the Virginia Supreme Court's interpretation. It is clear from that court's decisions that the statute does not require the trial court to list specific mitigating circumstances. *See, e.g., LeVasseur v. Commonwealth*, 225 Va. 564, 594-95, 304 S.E.2d 644, 661 (1983). Because the jury instructions in this case were consistent with the sentencing statute, Buchanan's due process argument must also fail.

III

The second claim advanced by Buchanan is that the trial court impermissibly limited his ability to present mitigating evidence at the sentencing hearing. This claim is based on the trial court's exclusion of hearsay testimony offered by Buchanan's expert witness, Dr. Robert Brown.

Dr. Brown was Buchanan's principal mitigation witness. In preparation for trial, he performed a psychological evaluation of Buchanan and extensively investigated

his personal and family history. As part of his investigation, he interviewed many of Buchanan's friends and relatives.

Dr. Brown testified at trial that, in his expert opinion, Buchanan was under extreme emotional stress at the time of the killings. He went on to testify extensively about the evidence that supported his conclusion. However, the trial court did not permit him to repeat some of the statements made to him during the interviews he had conducted. Sustaining the prosecution's hearsay objection, the judge excluded all such statements made by individuals who had not appeared at trial. Although the statements were excluded, the judge offered to stay the proceedings and allow the individuals who had made the statements to testify in person. Buchanan declined the offer.

Buchanan insists that application of the hearsay rule in this case violated his constitutional right to present mitigating evidence. As support for his position, he relies on *Green v. Georgia*, 442 U.S. 95 (1979).

Based on the "unique circumstances" present in *Green*, the Court held that Georgia's admittedly proper application of its hearsay rule during the sentencing phase of a death penalty trial violated the Due Process Clause. 442 U.S. at 95-97. In that case, the trial court excluded an out-of-court statement of a man who had already been convicted of capital murder for his role in the killing for which the defendant was being tried. The excluded statement, made spontaneously to a close friend, amounted to an admission that the declarant alone was responsible for the killing. The Court found that

"[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [citation omitted], and substantial reasons existed to assume its reliability." *Id.* at 97. Under those circumstances, the Court held that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' " *Id.* at 97 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

The exclusion of the hearsay statements offered by Dr. Brown does not fit within the narrow exception recognized by *Green*. In *Green*, the excluded statement strongly tended to show that the defendant was innocent. In this case, the statements were offered only for the purpose of providing additional support for Dr. Brown's conclusion that Buchanan acted under extreme emotional stress. Even without the proffered statements, Dr. Brown's testimony provided ample evidence to explain his opinion. For this reason, the statements would have had only cumulative probative value. After the trial court offered to continue the case and summon the relatives and friends whom Dr. Brown interviewed, Brown's attorney said: "I don't want to do that Judge. We have enough. I just want to object to your not allowing it in."

The excluded statements also lack the inherent reliability of the statement excluded in *Green*. The statement in *Green* was against the declarant's penal interest, made spontaneously to a close friend, and the state itself had relied on the excluded testimony to convict the declarant of capital murder. At Buchanan's trial, these compelling circumstances do not appear.

The evidence in this case discloses that the application of Virginia's hearsay rule did not rise to the level of a constitutional violation.

IV

Buchanan's third claim is that his trial counsel was ineffective because he failed to take advantage of what Buchanan sees in retrospect as a certain opportunity to have avoided a death sentence. Buchanan contends that, if he had pleaded guilty to the four first degree murder indictments, the constitutional guarantee against double jeopardy would have precluded any further prosecution based on the same killings. This means, he argues, that the Commonwealth could not have prosecuted the capital murder indictments. Because Buchanan's sole objective throughout the criminal proceeding was to avoid the death penalty, he claims that his trial counsel's failure to recognize this opportunity deprived him of his Sixth Amendment right to counsel.

Contrary to Buchanan's assertion, pleading guilty to the first degree murder indictments would not have precluded the Commonwealth from prosecuting the capital charges. The Supreme Court addressed a nearly identical issue in *Ohio v. Johnson*, 467 U.S. 493 (1984). In that case, the defendant pleaded not guilty to the murder and aggravated robbery charges against him and, at the same time, pleaded guilty to the lesser included offenses of involuntary manslaughter and grand theft. The trial court accepted the guilty pleas, sentenced the defendant, and then dismissed the murder and aggravated robbery charges on double jeopardy grounds. *Id.* at 494. On

appeal, the Supreme Court of Ohio affirmed. The Supreme Court of the United States reversed, holding that pleading guilty to the lesser included offenses did not bar the state from prosecuting the greater offenses since all of the charges were brought in a single prosecution. *Id.* at 497-502.

Buchanan asserts that *Johnson* is inapplicable. He points out that in *Johnson* all of the charges were brought in a single indictment. In this case, on the other hand, Buchanan was charged with first degree murder and capital murder in separate indictments.

The distinction drawn by Buchanan would not have made any difference. In *Johnson*, the Court found that permitting the state to pursue the greater charges, even after the defendant pleaded guilty to the lesser charges, did not implicate any of the interests protected by the Double Jeopardy Clause. The Court noted that, by pleading guilty to the lesser included offenses, the defendant "has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial." 467 U.S. at 501. The Court concluded that a defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.* at 502. While it is true that *Johnson* involved a single indictment with multiple counts, the Court's reasoning applies equally to a case involving multiple indictments brought in a single prosecution. By itself, the fact that the Commonwealth charged Buchanan in separate indictments

does not constitute the type of "governmental overreaching that double jeopardy is supposed to prevent." *Id.* at 502.

Buchanan argues that, under Virginia law, he had an absolute right to plead guilty at any time to the entirety of any indictment against him. He relies on *Graham v. Commonwealth*, 11 Va. App. 133, 137-40, 397 S.E.2d 270, 273 (1990), but his reliance is misplaced. The Virginia Court of Appeals explained that a plea of guilty to a lesser included offense would not bar prosecution of a greater offense pending in the same prosecution:

> The only discretion given to a court by the statute is the right to refuse a plea of guilty to any lesser offense included in the charge upon which the accused is arraigned. Here the defendant wished to plead guilty to the whole of the indictment, not to a lesser included offense.

Graham, 11 Va. App. at 137, 397 S.E.2d at 272.

Although the explanation in *Graham* is dictum, it was confirmed in a subsequent case. The Virginia Court of Appeals held that pleading guilty to a first degree murder indictment does not preclude the simultaneous prosecution of a capital murder indictment involving the same transaction. *Rea v. Commonwealth*, 14 Va. App. 940, 943-45, 421 S.E.2d 464, 466-68 (1992) (relying on *Ohio v. Johnson*, 467 U.S. 493).

Against this background, it is evident that Buchanan's right to counsel was not violated. The Sixth Amendment right to counsel guarantees effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to establish deprivation of this right,

a criminal defendant must show both that counsel acted incompetently and that counsel's incompetence was prejudicial. *Id.* at 687.

Because there was no reason to believe that pleading guilty to the first degree indictments would have barred prosecution of the capital charges, the failure of Buchanan's counsel to recommend this course of action cannot be labelled incompetent. Additionally, since Buchanan could not have blocked prosecution of the capital charges by pleading guilty to the lesser included offenses, pleading not guilty did not prejudice him. For these reasons, we reject Buchanan's argument that his counsel was ineffective.

V

Next, Buchanan asserts that the Virginia Supreme Court's review of his case was constitutionally inadequate in two respects. First, he alleges that the court failed to consider the mitigating evidence he offered. Second, he claims that the court did not conduct the proportionality review required by Virginia statute in a rational manner. He argues the first deficiency violated both his due process and Eighth Amendment rights, while the second violated his due process rights. According to Buchanan, the federal due process violations arise because the Virginia Supreme Court improperly implemented the pertinent state statute.

The Eighth Amendment requires that the death penalty not be imposed in an arbitrary or capricious manner. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Meaningful appellate review is an important safeguard against

improper imposition of the death penalty. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). Consistent with those constitutional requirements, Virginia law directs the Commonwealth's highest court to review the record in every death penalty case to determine whether the sentence was "imposed under the influence of passion, prejudice or any other arbitrary factor." Va. Code Ann. § 17-110.1.C.1 (Michie 1996).

The Virginia Supreme Court conducted the mandatory statutory review in this case. The court engaged in an "independent review of the record." By doing so, the court necessarily became aware of the mitigating evidence Buchanan had presented. Nevertheless, the court's examination "reveal[ed] nothing to suggest that the death penalty was imposed . . . as the result of passion, prejudice, or arbitrariness." *Buchanan*, 238 Va. at 418, 384 S.E.2d at 774. On collateral review, federal courts are not required to re-examine a state court's good faith findings. *Cf. Walton*, 497 U.S. at 656. Moreover, the district court conducted its own independent review of the record and, after specifically taking Buchanan's mitigating evidence into account, concluded that the death penalty had not been imposed arbitrarily. For these reasons, Buchanan cannot prevail on this point.

Also without merit is Buchanan's claim that the Virginia Supreme Court's proportionality review was inadequate. Although the Virginia capital sentencing statute requires a proportionality review, Virginia Code § 17-110.1.C.2, the federal Constitution does not. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). Buchanan's claims of inadequacy do not provide sufficient constitutional grounds to warrant a writ of habeas corpus. *Peterson v.*

Murray, 904 F.2d 882, 887 (4th Cir. 1990); *Shaw v. Martin*, 733 F.2d 304, 316-17 (4th Cir. 1984).

VI

Buchanan's final contention is that the trial court violated his federal due process rights by refusing to instruct the jury on second degree murder. Among the assignments of error in his appeal to the Supreme Court of Virginia, Buchanan argued that the trial court had erred because it did not give an instruction on second degree murder in compliance with Virginia law. After carefully reviewing the record, the Virginia Supreme Court rejected this argument, concluding that a second degree murder instruction was inappropriate because it lacked evidentiary support. *Buchanan*, 238 Va. at 408-12, 384 S.E.2d at 769-71 (citing Virginia cases). Buchanan, however, did not contend in his direct appeal to the Virginia Supreme Court that the omitted instruction violated federal due process. As a result, the district court properly concluded that Buchanan had not met the exhaustion requirement found in 28 U.S.C. § 2254. Failure to raise a federal claim in state court bars federal review of the omitted claim. *Duncan v. Henry*, 115 S. Ct. 887, 888 (1995); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Finding no error, we affirm the judgment denying Buchanan's petition for a writ of habeas corpus.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Filed Jan. 27, 1997)

No. 96-4

CA-93-306-R

DOUGLAS MCARTHUR BUCHANAN, JR.

Petitioner-Appellant

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections; COMMONWEALTH OF VIRGINIA

Respondents-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court of the United States

No. 96-8400

Douglas McArthur Buchanan, Jr.,

Petitioner

v.

Ronald J. Angelone, Director, Virginia Department of Corrections, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Copurt of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

April 28, 1997

(7)

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

No. 96-8400

In The

Supreme Court of the United States

October Term, 1997

DOUGLAS MCARTHUR BUCHANAN, JR.,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Va. Department of Corrections,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is the Eighth Amendment right to be free from arbitrary and capricious imposition of the death penalty violated when the jury is not instructed regarding the existence of statutorily defined mitigating circumstances, despite defense counsel's request for such instructions, and where the jury charge is devoid of any reference to the concept of mitigation?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996), and is set forth in the joint appendix at 201-214. The opinion and order of the district court is unreported, and is set forth in the joint appendix at 87-200.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1996. A timely Petition for Rehearing was filed on January 13, 1997. The order denying rehearing was entered on January 27, 1997, and is set forth in the joint appendix at 215. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

The jurors who convicted Douglas Buchanan, Jr., of capital murder and sentenced him to death were never instructed by the court about their constitutional obligation to consider evidence in mitigation of punishment. This was prejudicial because the central issue for the jurors was not whether this nineteen year old had killed members of his family – no one disputed that. The issue was whether the relentless abuse of petitioner by his "family," torture which had mentally crippled him, was mitigating and provided support for a sentence less than death. Doug Buchanan's hope of avoiding a death sentence depended upon the jurors' constitutionally required, full consideration of this mitigation. This hope was dashed when the trial court refused all defense efforts to have the jurors instructed about the concept of, or even mention the word, mitigation.

The facts of the homicides, as set forth in the opinion of the Virginia Supreme Court, are as follows:

> The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that day, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge

> Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.
>
> Buchanan found his father outdoors behind the house. He explained his having the rifle by telling his father that he had been squirrel hunting. The two went inside where they engaged in conversation. They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother. Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.
>
> Fifteen minutes later, Buchanan heard his brothers arriving from school. He stood waiting behind the living room door, rifle in hand. Donnie, who was ten years old, came in first and

walked past Buchanan who shot him in the back of the head. Buchanan then placed the rifle to Donnie's face and shot him near the right temple.

J.J., who was thirteen years old, heard the shots and started to run. Buchanan went outside to the porch and shot J.J. twice as he ran. He then helped J.J. walk inside the house where he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra column, severing the windpipe and all major veins and arteries in her neck. She also sustained defensive wounds to her hands.

Buchanan ran from the house through the woods to his parked vehicle. Along the way, he tossed his bloody tennis shoes and the knife into

a dumpster. As his wife drove him away, he tossed the rifle out of the window.

Buchanan v. Commonwealth, 384 S.E.2d 757, 760-61 (Va. 1989). J.A. 79-81.[1]

The intra-family nature of these homicides obviously increased their ugliness. But it might have presented another face as well, because the crime was the culmination of years of intense family turmoil. At trial, numerous lay witnesses, as well as defense and prosecution mental health experts, documented the dramatic and extraordinary power-keg in which Doug was raised and provided a detailed account of the traumatic loss, neglect and abuse that marked Doug's infancy, childhood and adolescence, all of which ended tragically with this crime, which occurred when Doug was only nineteen. Given the nature of the homicides, it was especially critical for the jury to be fully and completely instructed on the scope and meaning of mitigation, but it was not.

Doug was extremely close to his natural mother and her family. App. 90.[2] When Doug was two, his mother was diagnosed with breast cancer. This sad revelation began a long, debilitating and ultimately fatal battle with the disease. As a result of his mother's illness, Doug

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[1] As will be evident from petitioner's statement of the case, many of the above "facts," – e.g., the state court's assertion that he went to the house to kill his father – which are contained in the Virginia Supreme Court's opinion are inaccurate or misleading, and certainly are not fairly supported by the record as a whole.

[2] "App." refers to the joint appendix filed in the Court of Appeals.

spent most of his time with his grandparents and his aunt, whose homes adjoined his parents' home. J.A. 4-6. When Doug was nine, his mother's struggle with cancer ended; she was thirty-one years old. J.A. 5.

Within weeks of Doug's mother's death, his father began a sexual romance with his deceased wife's nineteen year-old first-cousin, Geraldine Patterson. J.A. 7. The two married several months later. *Id.* This union was met with strong disapproval from the surrounding relatives, especially on Doug's mother's side of the family. Doug was caught in the middle and was raised in "a tug of war," a victim of "a longstanding family feud" brought about by his mother's death. App. 217.

Soon after their marriage, Doug's stepmother and father initiated a relentless campaign to purge from their home any sign of Doug's natural mother. Doug was prohibited from mentioning his natural mother. Geraldine insisted on replacing all the furniture that belonged to the former Mrs. Buchanan and she systematically destroyed all photographs of her. J.A. 11. Emblematic of Geraldine's wicked campaign was her command that Doug watch as she burned pictures of Doug's mother. J.A. 3. Geraldine left no stone unturned. She even threw away one photo because she was sure Doug's mother's *legs* could be seen in the background. J.A. 4. Nothing was sacred. Personal memorabilia that had belonged to Doug's mother was confiscated and thrown away. Although these items were just threatening junk to Geraldine; Doug naturally cherished them. App. 97.[3] As a final torment, Doug was

[3] For example, Doug slept with his mother's rings until they were discovered and taken from him. App. 165.

actually forbidden from visiting his own mother's grave, which was only several hundred yards from Doug's home.[4] J.A. 13.

The next phase of the campaign was to isolate Doug from his mother's relatives. The steps Doug's father and stepmother took to accomplish this were extraordinary. They wired shut the gate that led from their property to the property of Doug's grandparents, and posted numerous "no-trespassing" and "keep out" signs on the chain link fence that divided the two properties. J.A. 4-5. Similar signs went up on the boundary facing Doug's aunt and uncle's home. *Id.* Geraldine and Buchanan, Sr. refused to allow Doug to play with his maternal cousins, or even talk to them while he waited with them for the school bus. App. 94-95, 100-02; J.A. 13-14. If his maternal cousins were expected to be present at church outings, Doug was not allowed to participate. J.A. 15-16. Doug was prohibited from attending his maternal grandmother's funeral. Any Christmas presents he received from his mother's relatives were promptly returned. J.A. 15. Any violation of these rules was severely punished.[5]

[4] Doug's father and stepmother repeatedly degraded his mother's memory, calling her a "whore" and barraging Doug with their accusations that she had been sexually promiscuous and unfaithful to his father. App. 36; 98; 114.

[5] When Doug was sixteen, his maternal grandparents brought a successful action for visitation rights. The court ordered that Doug be permitted to go to their house for several hours one day a week. The order did not, however, permit him to visit with any other maternal relatives. The scheduled visits were followed by repercussions at Doug's home.

As part of their agenda of emotional abuse, Doug's father and stepmother took great pains to impress upon him his inferior status in the new family. Doug, for example, was forbidden from participating in after-school activities; his half-brothers, however, were encouraged to do so. Doug was not permitted to get his driver's license until he was eighteen though one of his half-brothers received a car at age thirteen. App. 118. Witnesses described Doug, and correctly so, as a "prisoner" in his own yard, (App. 36), while his half-siblings were free to roam. When his father and stepmother returned from vacation, they would bring home gifts, but only for Doug's half-brothers. Doug received nothing.

When Doug was just eighteen, he joined the National Guard and married.[6] This added new turmoil to the equation. Geraldine now directed her contempt at Doug's new wife, blaming her for encouraging him to maintain contact with his maternal relatives. App. 38. Shortly after the marriage, Doug was hospitalized for an emergency appendectomy, and his maternal relatives gathered at his bedside. For allowing this visit, and for choosing to recuperate at his maternal aunt's house, Doug's father and stepmother stopped talking to him. App. 115. After recovering from his surgery, Doug learned that his wife was pregnant with their first child.

This history of traumatic loss and emotional abuse had devastating consequences. At the penalty phase of

[6] Doug's wife was two years older than he and had a history of emotional problems. Soon after their marriage she joined the Air Force but was rejected during basic training as "unfit." App. 38.

the proceedings, defense counsel called Dr. Robert Brown – a professor at the University of Virginia and one of a handful of people in the country who is both a psychiatrist and psychologist – to explain the effect on Doug of his natural mother's death, together with his stepmother's systematic effort to eradicate all memories of Doug's mother. According to Dr. Brown, children who lose their mothers before age ten are much more prone to suffer from mental disorders later in life than are other children, even if raised in a healthy home environment, which Doug was not. Emotionally, Doug never matured past the age of ten, and he suffered from depression throughout his teenage years. App. 175.[7] He frequently contemplated suicide. App. 42.

In regard to these crimes, Dr. Brown testified (as did Doug) that the situation came to a tragic head on a weekday afternoon when Doug went to his step-mother's house to try and "straighten things out" with her. Doug had recently become obsessed with the idea that he had to "resolve this festering [family] cancer." App. 226. He could not, he decided, allow his child to be raised in the same environment in which he had been raised. *Id.* Although he did not expect to find his father home from work, the two greeted each other cordially, and Doug tried to talk to his father about Doug's marriage. App. 117. His father, however, quickly turned the conversation

[7] Dr. Brown testified that Doug's I.Q. scores dropped ten points in the years after his mother's death. This unexpected, precipitous plunge was likely the result of Doug's emerging psychological problems. App. 168.

around to Doug's mother. App. 18. The familiar accusations that she was promiscuous and a "whore" returned. In the ensuing argument, Doug's father told Doug he had purchased a car for his favored thirteen year old half-brother, a revelation that, given the family's history, was clearly calculated to provoke. App. 118-19. As his father started to walk to the doorway, Doug shot him. He then killed his stepmother and half-brothers.

Dr. Brown testified that, at the time of the offense, Doug was acting under "extreme emotional stress," and that at times "he lost meaningful contact with reality." App. 174; 227. The Commonwealth's experts agreed that Doug had been severely abused – describing it as a "pathological relationship" (App. 232-33) – disagreeing only with Brown's ultimate conclusion that Doug had acted "under extreme mental or emotional disturbance."

The trial court instructed the jury regarding the single statutory aggravating circumstance upon which the Commonwealth relied: "vileness." J.A. 73.[8] With respect to mitigation, however, the trial court said nothing. *Id.* The sentencing jury remained ignorant not only of the meaning of mitigation in general, but also of the specific circumstances the Virginia Legislature deemed statutorily

[8] In Virginia, which is a non-weighing state, the jury first determines whether the prosecution has established one (or both) of the statutory aggravating factors for death eligibility: future dangerousness and vileness. *See Tuggle v. Netherland*, 116 S.Ct. 283, 284 (1995) (*per curiam*). If the jury does not find an aggravating circumstance, then it must impose a life sentence. If it finds one or both of the statutory aggravating circumstances, then the jury determines whether the defendant should be sentenced to death or to life imprisonment. *Id.*

relevant. *See* Va. Code § 19.2-264.4B. The substantial mitigating evidence presented at Mr. Buchanan's sentencing proceeding supported findings of three statutory mitigating circumstances: that the crime was mitigated (1) by his age; (2) by the fact that he had no significant history of prior criminal activity; and, (3) because he was acting "under the influence of extreme mental or emotional disturbance at the time of the offense."[9] The trial judge, however, denied petitioner's request that the jury be told about any of these statutory mitigating factors. J.A. 74-76. Moreover, the trial judge denied counsel's request that, in addition to the statutory mitigating factors, the jury be instructed to consider "the circumstances surrounding the offense, the history and background of Douglas McArthur Buchanan, Jr., and any other facts in mitigation of the offense." J.A. 74. Instead, the jury was given the threadbare instruction that:

[9] At the time of Mr. Buchanan's trial, the relevant part of the statute read as follows:

> Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity; (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (iii) the victim was a participant in the defendant's conduct or consented to the act; (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; (v) the age of the defendant at the time of the commission of the offense.

Since Mr. Buchanan's trial, an additional mitigating factor – "(vi) mental retardation of the defendant" – has been added.

> If you find from all the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph [that the offense was vile], then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

J.A. 73. The jury returned a verdict fixing the sentence at death,[10] and the trial judge imposed a death sentence.[11]

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[10] The verdict form, signed by the foreperson only, read as follows:

> We the jury, on the issues joined, having found the defendant guilty of capital murder by having wilfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involves torture, depravity of mind or aggravated battery to the above four victims, or any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

J.A. 77.

[11] In Virginia, the jury "fix[es]" the punishment, which is more than a recommendation but less than an imposition of sentence. *Frye v. Commonwealth*, 345 S.E.2d 267, 286 (Va. 1986). If the jury fixes the sentence at life, the trial judge must impose a life sentence. Va. Code Ann. § 19.2-264.4(A). If the jury fixes the sentence at death, the trial judge must order a probation officer to investigate the defendant's history and "any and all other relevant facts, to the end the court may be fully advised as to whether the sentence of death is appropriate and just." Va. Code Ann. § 19.2.-264.5. "After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of life imprisonment." *Id.* The court's discretion to set aside a death sentence is narrowly limited. *Frye*, 345 S.E.2d at 286.

On direct appeal, petitioner argued that the trial court's inadequate instruction as to mitigation violated the Eighth Amendment. The Virginia Supreme Court rejected this claim. According to the Virginia Supreme Court, the fact that a capital sentencing jury is told about the applicable statutory aggravating factors, but not about the applicable statutory mitigating factors, actually benefits capital defendants, because "[i]f the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation." *Buchanan v. Commonwealth*, 384 S.E.2d 757, 773 (Va. 1989) J.A. 84; *see also Clark v. Commonwealth*, 257 S.E.2d 784, 791 (Va. 1979).[12]

On appeal from the denial of the petition for writ of habeas corpus, the United States Court of Appeals for the Fourth Circuit held that Buchanan was not entitled to instructions explaining the concept of mitigation or identifying the statutory mitigating circumstances established by the Virginia General Assembly relevant to Mr.

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[12] The Virginia Supreme Court had also previously stated that apprising the jury to consider "*all* the evidence" is sufficient to inform the jury of the concept of mitigation and the constitutional duty to consider any mitigation presented. *LaVasseur v. Commonwealth*, 304 S.E.2d 644, 661 (Va. 1983).

Buchanan's case. *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996). The Fourth Circuit concluded that the jurors understood the concept of mitigation and all that it encompasses, and had considered all the evidence presented in mitigation, simply because the word "mitigation" appeared in the pre-printed verdict form. *See Buchanan*, 103 F.3d at 347-48 (*citing Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991) J.A. 204-06; *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990); and *Briley v. Bass*, 750 F.2d 1238, 1244 (4th Cir. 1984)). To support its conclusion, the court of appeals relied on *Zant v. Stephens*, 462 U.S. 862, 890 (1983), which, the court observed, does "not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances," *Buchanan*, 103 F.3d at 347 (J.A. 204), even, according to the Fourth Circuit, when the state's instruction leaves the concept of mitigation completely out of the instructions.

This Court granted certiorari. J.A. 216.

SUMMARY OF ARGUMENT

The trial judge completely failed to provide the jury which sentenced Doug Buchanan to death with any guidance regarding its Eighth Amendment responsibility to consider the abundant evidence presented in mitigation of punishment. Despite the fact that the evidence supported the submission of several statutory mitigating factors, the trial judge refused both to inform the jury of the legislative mitigating criteria and to otherwise provide the jury with any definition or explanation of mitigation.

In fact, the word mitigation nowhere appears in the sentencing instructions.

Post-*Furman* Eighth Amendment jurisprudence requires that a capital sentencing jury be provided with sufficient legal guidance to enable it to consider the circumstances of the crime and character of the defendant; i.e., both the evidence in aggravation of punishment and the evidence in mitigation of punishment. In sum, the jury must be properly instructed regarding all facets of the sentencing process. In petitioner's case, the jury was provided no guidance regarding the mitigation side of the constitutional equation, and this failure rendered petitioner's death sentence arbitrary and unreliable in violation of the Eighth and Fourteenth Amendments.

The Virginia Supreme Court and the Fourth Circuit upheld this instruction on several erroneous bases. The state court reasoned that the failure to tender the statutory mitigating circumstances actually benefited petitioner, because the jury might then have believed it could not consider non-statutory mitigating circumstances. This assertion is misguided legally and factually, as it ignores the fact that petitioner's trial counsel requested an instruction which specifically informed the jury of its obligation to consider any non-statutory mitigating circumstances. The Fourth Circuit relied on the fact that the word mitigation was contained in the verdict form. However, this pre-printed form – signed only by the foreperson – was not part of the sentencing instructions, and the jury was not required to even review it. The court of appeals also relied upon language in this Court's opinions indicating that states are free to structure and shape the jury's consideration of mitigating evidence. The

instructions in this case, however, did no such thing. Rather, the combination of withholding the statutory mitigating factors and failing to explain the concept of mitigation turned the sentencing proceeding into an unregulated, arbitrary free-for-all. Finally, the fact that counsel was permitted to argue the evidence in mitigation is also irrelevant as this Court has long held that arguments of counsel are no substitute for a jury instructed in conformity with the Constitution.

ARGUMENT

I. THE FAILURE TO APPRISE THE SENTENCING JURY OF THE NATURE AND FUNCTION OF MITIGATION RENDERED PETITIONER'S DEATH SENTENCE ARBITRARY, CAPRICIOUS AND UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The only part of the sentencing instructions which arguably referred to the jury's Eighth Amendment obligation to consider the substantial mitigating evidence presented by Mr. Buchanan's trial counsel was a single sentence which stated "[i]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment." J.A. 73. This scant, vague language did not convey to the jurors their duty to "consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of crime," *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). Ensuring that sentencers consider mitigation is a constitutionally indispensable aspect of the Eighth Amendment's requirement that

the state devise capital sentencing schemes which are free from the risk of arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972).

This Court's "capital punishment cases under the Eighth Amendment address two different aspects of the capital decision making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). It is the second aspect of the process – the decision actually to impose or withhold a capital sentence – that is in issue in Doug Buchanan's case. As the Court has repeatedly held, "[w]hat is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis added).

In order to ensure that a capital sentencing jury makes such a determination, a State must

> (1) "confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case,' " *Graham v. Collins*, 506 U.S. 461, 468 (1993) (*quoting Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976) (plurality opinion));
>
> *and*
>
> (2) "limit and channel the discretion . . . to ensure that death sentences are not meted out 'wantonly' or 'freakishly.' " *Gregg*, 428 U.S. at 270 (*quoting Furman v. Georgia*, 408

> U.S. 238, 310 (1972) (Stewart, J., concurring)); *see also California v. Brown*, 479 U.S. 538, 541 (1986) ("Sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses").

These principles are firmly established by a "long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing." *Stringer v. Black*, 503 U.S. 222, 232 (1992). This long line of authority "seeks to reconcile two competing, and valid, principles in *Furman*, which are to allow mitigating evidence to be considered and to guide the discretion of the sentencer." *Johnson v. Texas*, 509 U.S. 350, 373 (1993).

The two halves of this dual imperative are necessarily in tension, *see, e.g., Graham*, 506 U.S. at 468; *Walton v. Arizona*, 497 U.S. 639, 656-674 (1990) (Scalia, J., concurring), and the States' constitutional obligation is to "accommodate[] *both* of [them]" in some responsible way. *Johnson*, 509 U.S. at 373 (*quoting Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion) (emphasis added). The task is not overly difficult. Indeed, the large number of capital sentencing procedures which have passed constitutional muster in this Court attest to the fact that this task can be accomplished in many different ways. No single "right" form of death penalty statute satisfies the Eighth Amendment. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Likewise, where a State chooses to make the life-or-death determination depend upon particular aggravating and mitigating circumstances, "the Constitution does not require a State to adopt specific standards for

instructing the jury in its consideration of [the] aggravating and mitigating circumstances." *Zant*, 462 U.S. at 890; *accord Tuilaepa*, 512 U.S. at 979.

What is required, however, is some reasonable accommodation of individualization with safeguards against arbitrariness. In the absence of such an accommodation, a capital defendant is either "deprived . . . of the individualized treatment to which he is entitled under the Constitution," *Parker v. Dugger*, 498 U.S. 308, 322 (1991), or "deprived of the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases." *Stringer*, 503 U.S. at 222.[13]

To state these principles is all it takes to demonstrate the constitutional deficiency of the Virginia procedure under which Douglas Buchanan was sentenced to death. Far from accommodating controlled discretion with individualized consideration, this Virginia procedure does exactly the opposite: it makes no effort to provide guidance with respect to mitigation, thereby abandoning any effort to rationalize individualization, which in turn invites arbitrary and capricious sentencing. The *only* guidance given to Mr. Buchanan's jurors was that if they found an aggravating circumstance (beyond a reasonable doubt), then they

> may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall

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[13] The reference is to *Godfrey v. Georgia*, 446 U.S. 420 (1980), and sentencing standards that were "vague and imprecise, inviting arbitrary and capricious application of the death penalty." *Stringer*, 503 U.S. at 228.

> fix the punishment of the defendant at life imprisonment.

J.A. 73. Apart from no instruction at all, it is difficult to imagine a capital sentencing instruction *more* conducive to arbitrary application or *less* informative about the principle of individualization than this one.

In essence, this instruction tells jurors that they may do anything they please for any reason or no reason whatsoever, while at the same time withholding from them even the most modest explanation of what an individualized sentencing judgment means and entails, or how mitigation is to be appraised, compared to aggravation. The instruction does nothing to guide the jury's sentencing decision. So far as this instruction goes, once an aggravating circumstance is found, all concern for regular and rational decision making vanishes: if there is to be any basis for the choice of one punishment over another, the jury must invent it without benefit of law.

Post-*Furman* Eighth Amendment jurisprudence has been uniformly predicated on the supposition that "no longer can a . . . jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime. . . . *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (plurality opinion). In addition, "the jury's attention is focused on the characteristics of the person who committed the crime. . . . Are there any special facts about this defendant that mitigate against imposing capital punishment (*e.g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the

crime)." *Eddings v. Oklahoma*, 455 U.S. 104, 111 n. 6 (*quoting Gregg v. Georgia*, 428 U.S. at 197 (plurality opinion)). Capital sentencing jurors must be given "guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *California v. Ramos*, 463 U.S. 992, 999-1000 (1983) (*quoting Gregg*, 428 U.S. at 192 (emphasis omitted)). "Clear and objective standards" that provide the jury with "specific and detailed guidance" are the touchstone of a constitutional capital sentencing procedure satisfying the Eighth Amendment's mandate of reliability.[14] *Godfrey v. Georgia*,

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[14] Since *Gregg*, 428 U.S. 153 (1976), this Court has recognized that due to the qualitative difference between the death penalty and a term of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a particular case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Sumner v. Shuman*, 483 U.S. 66, 72 (1987) ("*Furman* . . . relied to a significant degree on the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). The constitutional demand of reliability requires that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg*, 428 U.S. at 189, and "procedures must be followed that are designed to assure reliability in [capital] sentencing determinations." *Zant v. Stephens*, 462 U.S. 862, 874, (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (The Eighth Amendment requires "process that will guarantee, as much as is

446 U.S. 420, 428 (1980); *see also Profitt v. Florida*, 428 U.S. 242, 258 (1976) ("The requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty"); *Sumner v. Shuman*, 483 U.S. at 74 (1987) (*Furman's* basic requirement is "objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death"). The purpose of these standards is to "serve both goals of measured consistent application and fairness to the accused." *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982).

Thus, when a State places the capital sentencing decision in the hands of a jury, the State must instruct the jury in clear, unambiguous terms which fully apprise the jury not only of its power to consider aggravating circumstances, but also of its obligation to consider all relevant mitigating evidence. *See Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("[W]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process"); *California v. Ramos*, 463 U.S. 992, 1000 (1983) (The jury must be given guidance "regarding the factors about the crime and the defendant that the State representing organized society, deems particularly relevant to the sentencing decision") (*quoting Gregg*, 428 U.S. at 176). Moreover, "the jury

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humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake") (O'Connor, J., concurring); *accord Lankford v. Idaho*, 500 U.S. 110, 125 (1991) ("[We have] emphasized the special importance of fair procedure in the capital sentencing context").

instructions – taken as a whole – must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background or character." *California v. Brown*, 479 U.S. 538, 545 (1986) (O'Connor, J., concurring); *see also Gregg*, 428 U.S. at 190 ("[a]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die"). "[E]xcessively vague sentencing standards," with respect to aggravation or mitigation, "lead to [the] arbitrary and capricious sentencing patterns condemned in *Furman*." *California v. Ramos*, 463 U.S. at 1000. If the explanation of mitigation is "too vague," *Tuilaepa v. California*, 512 U.S. at 973, citing *Walton v. Arizona*, 497 U.S. 639, 654, or if the instructions do not give the jury an appropriate "vehicle" to consider the mitigation presented, *Penry*, 492 U.S. at 328, then the Eighth Amendment is violated.[15] *See also California v. Ramos*, 463 U.S. at 999 (Georgia statute approved in *Gregg* was constitutional because it required "instruction on the factors to be considered").

The instructions given to Doug Buchanan's jury violated each and every one of these well-established

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[15] This same basic point was reaffirmed by Justice Souter in his concurring opinion in *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring): "The same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of legal terms used to describe the sentence (or sentencing recommendations) a jury is required to consider, in making a reasoned moral choice between sentencing alternatives." There can be no serious dispute that the concept of mitigation is a key – and in this case was the key – sentencing term.

principles. Assuming that the jury used any principles at all to reach its decision, it had to make them up as it went along. The instruction singularly and completely failed to inform the jurors that the Constitution requires them to consider in mitigation facts and circumstances that do not amount to an excuse or justification of the defendant's underlying criminal conduct. This notion is not self-evident, nor is it one that a juror would suppose, without being told, that the law contemplates. "Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." *Boyde v. California*, 494 U.S. at 384 (1990). Precisely for this reason a jury must be given "a meaningful basis to consider the relevant mitigating qualities" of whatever evidence in mitigation is presented to it. *Johnson*, 509 U.S. at 369. One may not presume that a jury considered those qualities when mitigation is not mentioned in the jury instructions.

In *Johnson*, the Court sought and found the necessary mitigation instruction in the trial judge's submission to the jury of Texas' Second Special Issue, relating to future dangerousness *vel non*. Had an instructional basis not been constitutionally necessary, the *Johnson* Court would not have sought one as its sole ground for distinguishing *Penry, supra*, from *Johnson*. And had none been found, the admission of all of the mitigating evidence presented on Johnson's behalf would not have sufficed to render his death sentence constitutional, because that evidence would not have been brought "within 'the effective reach of the sentencer,'" *Johnson*, 509 U.S. at 368 (*quoting Graham*, 506 U.S. at 475-76). The sentencing jury would

have "had no reliable means of giving mitigating effect to that evidence." *Graham*, 506 U.S. at 475.

By failing to offer any explanation whatsoever of the constitutional concept of mitigation, the Virginia instruction at issue here embodies two constitutional vices. First, it "afford[s] no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Roberts [Stanislaus] v. Louisiana*, 428 U.S. 325, 333-334 (1976) (plurality opinion). Second, because it provides no such opportunity, it flouts *"Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against arbitrary and capricious imposition of death sentences." *Id.* at 334.

Because it is so clearly unconstitutional, the Virginia instruction here is, not surprisingly, unique. No other state uses this perverse capital sentencing procedure. No other state denies the jury access to the very concept of individualization that is a precondition for rational evaluation of mitigating evidence. No other state effectively tells jurors to choose life or death on whatever grounds, rational or irrational, they please.[16] Nor does Virginia's

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[16] *See, e.g., State v. Bey*, 548 A.2d 887, 910-11 (N.J. 1988) ("The requirement that capital sentencing must not preclude consideration of relevant mitigating circumstances would be hollow without an explanation of how the evidence can mitigate the imposition of the death penalty. Otherwise the court would subject the defendant to the risk of an arbitrary and capricious jury determination. . . . In sum, it is the trial court's duty to assure that a reasonable juror will understand the meaning and function of mitigating factors"); *Johnson v. State*, 439 A.2d 542, 562 (Md. 1982). ("Where . . . the sentencing authority fails to

unique procedure rest on any special local need or penological objective. It rests on no legislative determination of necessity (*or* propriety), nor would any discernible legislative policy be adversely affected if it were stopped. On the contrary, the Virginia legislature has expressly enumerated a set of "factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decisions.*" *Ramos*, 463 U.S. at 999-1000 (emphasis in original) (citing *Gregg*, 428 U.S. at 176). The constitutional rub, quite simply, is that the Virginia Supreme Court has mysteriously forbidden the State's trial judges to tell its juries anything about these factors. *See Clark v. Commonwealth*, 257 S.E.2d 784, 791 (Va. 1979); *LaVasseur v. Commonwealth*, 304 S.E.2d 644, 661 (Va. 1983).[17]

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indicate the existence of a factor commanded by the legislature to be considered in mitigation of the death penalty, it is manifest that the sentence was imposed in violation of the statutory design, thus compelling us to vacate it. Were the sentencing authority free to disregard the existence of a mitigating factor and impose sentence without considering it, the statute authorizing such arbitrary imposition of the death penalty would be rendered patently unconstitutional"); *see also* Appendix to Petitioner's brief.

[17] In the courts below, respondent asserted that Virginia's sentencing statute merely defines what evidence is admissible. This view, however, is inconsistent with the language and history of the statute. While the first two sentences of Va. Code Ann. § 19.2-264.4B refer to "evidence," without distinguishing between that which would and would not be favorable to the defendant, the next sentence not only refers just to mitigation, but it refers to "facts" rather than "evidence." ("Facts *in mitigation* may include, but shall not be limited to" the circumstances specified). Respondent's view also leaves unexplained the General Assembly's recent decision to add

The Virginia Supreme Court's sole rationale for this prohibition is that informing jurors about the concept of mitigation would lead them to mistakenly think that the specific mitigating circumstances enumerated in the Virginia statute were exclusive, which would violate the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978). This justification is hollow, and doubly so in the present case. In the first place, it ignores the power (and obligation) of the presiding judge simply to tell the jury in no uncertain terms that the statutorily-enumerated mitigating circumstances are *not* exclusive – as is done in every other state that enumerates mitigating circumstances. *See, e.g., Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990). In the second place, it ignores the fact that in this case Buchanan's trial counsel drafted and submitted a proposed instruction telling the jury precisely that, and in constitutionally unimpeachable terms. J.A. 74.

In affirming the denial of the writ, the Circuit Court sought solace in the paltry fact that the jury verdict form, which only the foreperson signed, recited (among other

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mental retardation to the statute, or, for that matter, why the statute even exists, as the evidence whose admissibility it purportedly governs is evidence which can not be limited to the statutory factors consistent with the Constitution. Furthermore, respondent's interpretation is in conflict with the decisions of the Virginia Supreme Court indicating that the statute "provides a list of mitigating circumstances which the fact-finder is required to consider in *pari materia* with aggravating circumstances." *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979); *see also Buchanan*, 384 S.E.2d at 773 (referring to "the mitigating factors mentioned in the statute").

things) that having found the defendant's conduct in committing the murders

> or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or any one of them, and *having considered the evidence in mitigation of the offense*, we unanimously fix his punishment at death.

(emphasis added). Any comfort derived from this boilerplate language is cold indeed. Even if this verdict form did not – as it does – convey the unmistakable message that mitigation is an after-the-fact technicality; even if it did not – as it does – have all of the hallmarks of meaningless and unimportant legalese; and even if the judge had instructed the jurors that they should read it before reaching their life-or-death verdict – which he did not – the verdict form would still fail utterly to give the jurors any hint or clue as to what the concept of mitigation is all about.

In its prior submissions, the Commonwealth has sought to defend the lack of guidance given to the jury in petitioner's case by referring to this Court's prior statements that states are free to structure and shape the jury's consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." *Walton v. Arizona*, 497 U.S. 639, 652 (1990); citing *Boyde v. California*, 494 U.S. 370, 374 (1990); *see also Johnson v. Texas*, 509 U.S. 350 (1993). The problem with this defense is that Virginia has not sought to "structure and shape" the jury's consideration of mitigating evidence at all. Quite the contrary. It has left the jury's

consideration of mitigation evidence completely *un*structured, *un*shaped and *un*informed. The instructions in Mr. Buchanan's case gave the jury no structure or guidance: by withholding the statutory mitigating factors, failing to explain mitigation and, indeed, not even mentioning the word "mitigation" in the instructions, the sentencing process essentially became the completely arbitrary and capricious, unregulated free-for-all which *Furman* forbids. Furthermore, what was necessary to bring petitioner's capital sentencing proceeding within the Eighth Amendment's ambit was *de minimis*. All the trial court had to do was provide the jury with the mitigating factors contained in the statute together with a brief instruction explaining what mitigating evidence is and the jury's obligation to consider it. *See, e.g., Blystone*, 494 U.S. at 305 (jury provided with a non-exclusive list of statutory mitigating facts and a "catchall" providing for the consideration of "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense").

Imagine a scenario slightly different from what actually occurred at petitioner's trial. The lawyers discuss all the relevant sentencing considerations, including aggravation and mitigation. After hearing the arguments the trial judge informs the jury that "the lawyers' arguments pretty much summed it up. I don't see any need to instruct you further; please retire and decide whether the defendant should be sentenced to the death penalty or to life imprisonment." Surely the State would not contend, and this Court would not hold, that a death sentence resulting from a completely uninstructed jury satisfies the

Eighth Amendment's demand of reliability in capital sentencing. Yet, in many ways, an "instruction" of this sort would have been *better* than the charge given to petitioner's jury, because not only did the trial judge in petitioner's case (like the judge in the hypothetical) fail to highlight the jury's duty to consider the mitigating evidence presented, he *also* failed (unlike the judge in the hypothetical) to indicate in any manner that the arguments of counsel were correct statements of the relevant sentencing law.

Finally, it is unclear whether the Fourth Circuit also took some constitutional comfort from the circumstance that "Buchanan's counsel was permitted to discuss the [mitigating] factors in his closing argument." 103 F.3d at 347; J.A. 204. However, in *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978), this Court held that "arguments of counsel cannot substitute for instructions by the court."[18] Similarly, in *Boyde v. California*, 494 U.S. at 384, this Court recognized that "[a]rguments of counsel generally carry less weight than do instructions from the court" because they are typically viewed as "statements of advocates." *Cf. Carter v. Kentucky*, 450 U.S. 288, 303-04 (1981) ("the trial judge has a powerful tool at his disposal – the jury instruction – and he has an affirmative constitutional

[18] In *Taylor*, the Court rejected the State's claim that an accurate instruction was unnecessary due to defense counsel's arguments because "[p]etitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate . . . than the prosecutor will be. . . . It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Id.* at 489.

obligation to use that tool when a defendant seeks its employment" regardless of defense counsel's ability to argue the matter).[19] There is no substitute for a sentencing jury instructed in conformity with the Eighth and Fourteenth Amendments, and the failure to instruct the jury in accordance with this Court's longstanding Eighth Amendment principles left it free "to roam at large with only its untutored instincts to guide it." *Carter v. Kentucky*, 450 U.S. at 301.[20]

[19] Furthermore, the trial judge instructed the jury that "the opening statements and the closing statements of the attorneys are intended to help you in understanding the evidence and applying the law, but what the attorneys say is not evidence." Tr. 621. Additionally, during his opening statement at the sentencing phase, the prosecutor asserted: "I hope that you realize . . . that lawyers sometimes use emotional appeals to try and sway juries. I ask you to restrain your considerations to the facts you have heard from the stand, what comes from here or off the screen or on the pictures. Deal with the evidence and not the craftiness of the lawyers." Tr. 1253. These comments also limited the significance of counsel's closing argument.

[20] The same result flows inexorably from *Lockett* and its progeny. In *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the Court acknowledged that "the *risk* that the death penalty will be imposed in spite of factors which may call for a less severe penalty. . . . is. . . . incompatible with the commands of the Eighth and Fourteenth Amendments." Precisely this risk is at work in petitioner's case. The sentencing instructions provide no assurance that the jury even understood the concept of mitigation, much less considered the mitigating circumstances which were presented. As this Court recognized in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), "it is not enough to allow the defendant to present mitigating evidence to the sentencer. The

sentencer must also be able to consider and give effect to that evidence." *See also Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (A capital defendant has the right to "consideration of [mitigating] evidence by the sentencing authority"); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988) ("the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence"); *Boyde v. California*, 494 U.S. 370, 384 (1990) ("Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence"). It is irrelevant whether the barrier to the sentencer's consideration of mitigating evidence is the result of a state statute (*e.g., Lockett v. Ohio, supra*); jury instructions (*e.g., Mills v. Maryland, supra*); the sentencing court (*Eddings v. Oklahoma, supra*); or an evidentiary ruling (*Skipper v. South Carolina*, 476 U.S. 1 (1986)).

Penry is especially instructive because this Court recognized there that the "absence of instructions informing the jury that it could consider and give effect to the mitigating evidence" was the root of the Eighth Amendment violation in Penry's case. 492 U.S. at 328. The risk here is even greater than it was in *Penry* insofar as the jury here was not even made aware of its obligation to consider the mitigation presented. The term mitigation was never mentioned in any instruction, much less explained, and the discretionary nature of a Virginia jury's capital sentencing decision, unlike that of a jury guided by the Texas special issues, does not insure that the mitigating information which was presented entered into the jury's sentencing calculus. Thus there is no assurance that petitioner's jury took into account "factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.

CONCLUSION

For the foregoing reasons, the decision of the United Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Survey of Jury Sentencing Capital Jurisdictions And Requirement for Instruction On Mitigating Circumstances

A review of the state jurisdictions that use jury sentencing in capital sentencing shows that nearly every one has concluded that the Eighth Amendment requires that sentencing juries receive instruction on mitigating circumstances. The practices of those states are summarized below:

1. **Alabama** (jury weighs aggravating and mitigating circumstances and recommends sentence; trial judge is final sentencer; sentencer typically receives thorough instruction on relevant aggravating and mitigating circumstances)

Case law

Cochran v. State, 500 So.2d 1161, 1173-1174 (Ala.Cr.App. 1984) (jury must be instructed that mitigating circumstances are those that do not justify or excuse the offense, but which, in fairness and mercy, may be considered as extenuating, or reducing the degree of moral culpability and punishment)

Pattern Instruction: Proposed Pattern Jury Instruction for Use in the Sentencing Phase of Capital Cases Tried Under Act No. 81-178, October, 1982, pp. 81-90. The following instruction is typically given prior to when penalty phase begins:

"An aggravating circumstance is a circumstance specified by law which

indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life without parole instead of death. The issue in this sentencing hearing concerns circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in this case."

* * *

"The law of this state provides a list of some of the mitigating circumstances which you may consider. I will now read to you a list of some of the mitigating circumstances you may consider. These include: [7 statutory mitigating circumstances]"

"A mitigating circumstances does not have to be included in the list that I have read to you in order for it to be considered by you. In addition to the mitigating circumstances previously specified, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death."

2. **Arkansas** (jury weighs aggravating and mitigating circumstances prior to making sentencing decision; state supreme

court has long directed that juries receive instruction on relevant statutory aggravating and mitigating circumstances)

Case law

Miller v. State, 605 S.W.2d 430, 438 (Ark. 1980) (If there is any evidence of the aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury)

See also *Sheridan v. State*, 852 S.W.2d 772 (Ark. 1993); *Dansby v. State*, 893 S.W.2d 331 (Ark. 1995).

Pattern Instruction: Arkansas Model Jury Instruction – Criminal: Form 2, Mitigating Circumstances:

[Requires jury to determine whether it unanimously finds each enumerated mitigating circumstance to exist; or whether one or more members finds the existence of each enumerated mitigating circumstance, or whether jurors agree unanimously that the enumerated mitigating circumstances does not exist.]

3. **California** (jury weighs aggravating and mitigating circumstances; trial court utilizes model instruction on mitigation and case law requires general instruction on non-statutory mitigating circumstances)

Case law

Cases requiring trial courts to instruct using model instruction: *People v.*

Easley, 671 P.2d 813 (Cal.1983); *People v. Brown*, 709 P.2d 440 (Cal. 1985). These cases find 8th Amendment requires such instruction.

Pattern Instruction: CALJIC 8.85 (California Jury Instructions Criminal)

[This pattern instruction charges the jury that it shall consider all evidence received during any part of the trial, and "shall consider, take into account and be guided by the following factors, if applicable:" (the statutory mitigating circumstances), and "any other circumstances that extenuate the gravity of the crime. . . . "]

4. **Connecticut** (jury weighs aggravating and mitigating circumstances; trial courts required to administer thorough instruction on mitigation; in 1990, statute required return of life sentence upon showing of one mitigating circumstance)

Case law

State v. Breton, 663 A.2d 1026, 1051 (Conn. 1995), on the basis of *Penry*, *Lockett* and *Blystone* concluded:

"In the present case, the trial court gave the defendant wide latitude to introduce mitigating evidence. Furthermore, the trial court's instructions accurately and thoroughly explained to the jury the nature of statutory and nonstatutory mitigating factors generally, emphasizing that the defendant had the right to present "the fullest

information possible concerning the defendant's character, background and history" and that the jury was obligated to give "full and fair consideration of all the mitigating evidence." See footnote 39. Finally, the trial court provided the jury with a detailed explanation of the statutory mitigating factors relating to whether the defendant's ability to conform his conduct to the law was significantly impaired and focused the jury's attention on the mitigating evidence with specific reference to the defendant's witnesses.

"We nevertheless are persuaded that the recounting of the claimed nonstatutory mitigating factors by the trial court may assist jurors in their consideration of the mitigating evidence. Accordingly, at the new hearing, the court should, if requested by the defendant, instruct the jury on each of the statutory and nonstatutory mitigating factors claimed by the defendant and, again, if requested, submit to the jury an accurate written list of those mitigating factors."

5. **Florida** (jury weighs aggravating and mitigating circumstances and makes sentencing recommendation; instruction on relevant statutory mitigating circumstances, as well as on non-statutory mitigating circumstances long required)

Case law

Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) (new penalty trial required because trial court failed to instruct on impaired capacity statutory mitigating factor; " . . . an instruction is required on all mitigating circumstances 'for which evidence has been presented' and a request has been made.") *Jackson v. State*, 530 So.2d 269, 273 (Fla. 1988) (" . . . appellant argues that the standard jury instruction on mitigating circumstances, which included an instruction to the jury that it could consider any other aspect of the defendant's character or record, or any other circumstance of the offense, was inadequate. Further, appellant claims it was constitutional error for the trial court to refuse to instruct the jury according to a written list of nonstatutory mitigating circumstances prepared by appellant. We find these contentions without merit. Florida's standard jury instruction complies with the constitutional principles set forth in *Lockett v. Ohio*.")

Pattern Instruction: Penalty Proceedings: Capital Cases F.S. 921.141

[This instruction requires the court to advise the jury prior to commencement of the penalty phase that both sides may present evidence relevant to the aggravating and mitigating circumstances. Jury is told it will advise

judge on whether aggravating circumstances have been shown to exist and if so whether mitigating circumstances outweigh aggravating circumstances. After all the evidence is in, the jury receives instruction on any statutory mitigating factor for which evidence was presented as well as on nonstatutory mitigating evidence.]

6. **Georgia** (non-weighing state; if jury finds one statutory aggravating circumstance, it must then consider any other evidence in aggravation and mitigation in reaching sentencing determination; trial court must charge on mitigating circumstances; charge is available in pattern jury instruction)

Case law

Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977) ("The appellant argues . . . that the trial court erred in not charging the jury, in the absence of a request, on the law and existence of mitigating circumstances during the sentencing phase of trial. We hold the death penalty must be set aside for this reason, and for the additional reason that the trial judge's charge to the jury on aggravating circumstances was misleading. The trial judge did not instruct the jury that they should consider mitigating circumstances in arriving at their decision on the appropriate penalty to be imposed. This failure to inform the jury that they were

authorized to consider mitigating circumstances when there were mitigating circumstances authorized by law and warranted by the evidence was in contravention of requirements laid down in Code Ann. §§27-2534.1(b) and 27-2534.1(c). There are cogent reasons underlying this statutory requirement, for the United States Supreme Court has held in *Jurek v. Texas*, 428 U.S. 262, 271 (1976) that, 'in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.' ")

Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987) (*en banc*) ("Given Georgia's sentencing scheme, this circuit's case law has established that the eighth and fourteenth amendments require that the trial judge 'clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death.' ") (*See Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986) (*en banc*))

Pattern Instruction: Council of Superior Court Judges, *Suggested Pattern Jury Instructions, Volume II, Criminal Cases*, (2nd ed. 1991), part 4(B)(13), pp. 81-82.

Prior to the commencement of the guilt phase, the judge is to instruct the jury that "if the jury determines that the accused is guilty, then the state

and accused both have a right to submit additional evidence in aggravation, or in extenuation and mitigation of the punishment to be imposed.

After receiving all evidence at the penalty phase, the jury is to receive the following instruction: "Members of the jury, the defendant in this case . . . has been found guilty of the offense of . . . and it now becomes your duty to determine, within the limits prescribed by law, what punishment will be imposed for this offense. In arriving at this determination, you are authorized to consider all of the evidence received here in court (in both stages of this proceeding), presented by the state and the defendant throughout the trial before you, unless the court has previously instructed you to consider certain evidence introduced by the state for a limited purpose, in which event such evidence shall not be considered by you in determining punishment. You shall also consider the facts and circumstances, if any, in extenuation, mitigation and aggravation of punishment. Mitigating or extenuating facts or circumstances are those which you, the jury, find do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. Aggravating circumstances are those which you, the

jury, find increase the guilt or enormity of the offense, or add to its injurious consequences."

7. **Illinois** (jury must weigh aggravating and mitigating circumstances; has long used a pattern instruction that requires instruction on any statutory mitigating circumstance that is implicated by the evidence, and provides for additional catch-all instruction for non-statutory mitigating evidence)

Statutory law: 720 ILCS 5/9-1(c)

"The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty."

Case law

People v. Davis, 447 N.E.2d 353, 377 (Ill. 1983) ("We have held that where the instruction requires the jury to consider all mitigating factors, the dictates of Lockett v. Ohio (cite omitted) are satisfied.")

People v. Spreitzer, 525 N.E.2d 30, 47 (Ill. 1988) ("Under the Federal Constitution, mitigating factors include 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' In other words, any circumstances which suggest that the death

penalty would not serve the community's interest in deterrence or retribution is potentially mitigating. While the number of such possible mitigating factors is not infinite, it is certainly extremely large. Any list of such factors which is presented to the jury will always be open to the objections that it is incomplete and that it will tend to mislead the jury into thinking that they must limit themselves to the factors actually listed. Rather than requiring court and counsel to present the jury with a detailed laundry list of nonstatutory mitigation, we think it better to allow the court to instruct only on specific instances of statutory mitigation, while instructing the jury that they may consider any other nonstatutory mitigating factor.")

Pattern Instruction: Illinois Pattern Jury Instruction, Criminal IPI, Death Penalty Sentencing Instructions, 7C06, pp. 225-26.

"In deciding whether the defendant should be sentenced to death, you should consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence. Aggravating factors are reasons why the defendant should be sentenced to death. Mitigation factors are reasons why the defendant should not be sentenced to death."

[Committee Note – "The jury should be instructed on all statutory mitigating factors with any support in the evidence. Other statutory mitigating factors should be omitted."]

8. **Indiana** (jury advisory/judge sentencing weighing state; long-standing practice of trial court instructing jury on statutory mitigating factors; courts also give general instruction on non-statutory mitigating factors)

Case law

Baird v. State, 604 N.E.2d 1170, 1179 (Ind. 1992) ("[The instructions given] adequately convey[ed] not only examples of specific types of evidence that the jury may consider as mitigating but mandate that the jury consider any reason not to impose the death penalty, especially the character and history of the accused. The trial court did not commit error in refusing the tendered instruction.")

Pattern Instruction: Indiana Pattern Instruction No. 15.05. Death Penalty – Aggravating and Mitigation – Phase II. p. 348.

"[After instruction on aggravating circumstances, the instruction says,] You are also to consider the following mitigating circumstances: – [7 statutory mitigating factors and 1 catch-all]."

9. **Kansas** (jury sentencing weighing state; statute directs that jury must consider aggravating and mitigating circumstances)

Case law

State v. Walker, 845 P.2d 1, 21 (Kan. 1993) ("The trial court's instruction set forth the statutory mitigating factors claimed to be applicable and that the mitigating circumstances were not limited to those factors. Defense counsel was free to argue additional mitigating circumstances and tell the jury it could consider those circumstances in accordance with the court's instructions.")

Pattern Instruction: 56.00-B-G Capital Murder – Death Sentence – Death Proceeding

"B – The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence."

D – [8 statutory mitigating circumstances and 1 catch-all]

10. **Kentucky** (weighing state/jury sentencing; long practice of jury receiving instruction on the statutory mitigating circumstances and a catch-all for the non-statutory mitigating circumstances)

Statutory law: Kentucky Penal Code 532.025

(b)(2) In all cases of offenses for which the death penalty may be

authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating or mitigating circumstances which may be supported by the evidence.

(3) The instructions as determined by the trial judge to be warranted by the evidence or as required by KRS 532.030(4) shall be given in charge and in writing to the jury for its deliberations.

Case law

Smith v. Commonwealth, 845 S.W.2d 534, 539 (Ky. 1993) ("In promulgating KRS 532.025(2) the legislators of Kentucky recognized the dire necessity of having jurors consider mitigating circumstances when the death penalty might be imposed. . . . The language of the statute clearly states that the judge shall include instructions to the jury regarding mitigating circumstances. The trial court's failure to do so constituted an error to the substantial prejudice of appellant.")

Pattern Instruction: Kentucky Instructions to Juries – 11.06 Mitigating Circumstances, pp. 302-303.

"In fixing a sentence for the Defendant for the offense of Murder, you shall consider such mitigating or

extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true: [8 statutory mitigating circumstances and 1 catch-all] In addition to the foregoing, you shall consider also those aspects of the Defendant's character, and those facts and circumstances of the particular offense of which you have found him guilty, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true."

Comment – "This instruction contains all of the mitigating circumstances listed in KRS 532.025(2)(b). The jury should be instructed only on those which are appropriate from the evidence, with the appropriate numbers inserted in the parentheses. Where the jury is instructed to consider other mitigating circumstances, as in the last listed factor, there is no requirement to specifically instruct the jury on additional mitigating factors introduced by the Defendant. *Halvorsan v. Commonwealth*, 730 S.W.2d 921 (Ky. 1986); *White v. Commonwealth*, 671 S.W.2d 241 (Ky. 1983)."

11. **Louisiana** (non-weighing state; after jury finds statutory aggravating circumstance, it must then consider mitigating circumstances)

Case law

State v. Flowers, 441 So.2d 707, 716 (La. 1983) ("The jury must receive clear instructions which not only do not preclude consideration of mitigating factors, *Lockett v. Ohio,* [cite omitted], but which inform the jury of its duty and authority to consider the qualities and characteristics of the individual offender and the circumstances of the particular offense. *Spivey v. Zant* [661 F.2d 464, 471 (5th Cir. 1981)]. We find that the trial judge clearly and concisely instructed the jury on mitigation and its authority to recommend against death. The judge read Code of Criminal Procedure article 905.5 to the jury, emphasized to the jury its authority to consider any other relevant circumstances, and handed the jury a copy of the lists of aggravating and mitigating circumstances. Any further attempt may only lead to juror confusion and further efforts to define the definitions.)

Pattern Instructions §7.03 Instructions for Capital Case Sentencing Hearing – Closing Instructions, pp. 116-117.

"You must now determine whether the defendant[s] should be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of the sentence. You must consider the circumstances of the

offense[s] and the character and propensities of the defendant[s] in determining the sentence to be imposed."

"A. You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed."

"D. Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances. They are: [7 statutory factors]. However, in addition to these specifically provided mitigating circumstances, you must also consider any other relevant mitigation circumstance. You are not limited to those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed."

12. **Maryland** (weighing state/jury sentencing; pattern instruction on mitigating circumstances; requirement of findings on mitigating circumstances)

Case law

Johnson v. State, 439 A.2d 542, 561-62 (Md. 1982) ("In order for this Court to determine that the death sentence was not arbitrarily directed but, rather,

resulted from the guided consideration required of the sentencing authority by section 413 as well as the federal constitution, adequate information concerning the sentencing decision must be revealed. Consequently, section 413(j) requires that the sentencing determination be unanimous, be in writing, and that it specifically state:

> (1) Which, if any, aggravating circumstances it finds to exist;
>
> (2) Which, if any, mitigating circumstances it finds to exist;
>
> (3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);
>
> (4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (k); and
>
> (5) The sentence, determined in accordance with subsection (f) or (h).

"To further aid our review of the determination to impose the death penalty and in accord with the authority vested in this Court pursuant to section 413(l), we adopted Maryland Rule 772A. This rule provides for a standard form verdict sheet where the

sentencing body is required to indicate, by marking appropriate spaces, its consideration of each statutorily required step in the penalty determination process. [footnote omitted]. Moreover, the rule requires a detailed report by the trial judge providing additional information about the trial, the offense, the defendant, and the victim. All of this data thus provides the basis for our review of the jury's determination to end the life of the defendant."

"Where, as here, the sentencing authority fails to indicate the existence of a factor commanded by the legislature to be considered in mitigation of the death penalty, it is manifest that the sentence was imposed in violation of the statutory design, thus compelling us to vacate it. Were the sentencing authority free to disregard the existence of a mitigating factor and impose sentence without considering it, the statute authorizing such arbitrary imposition of the death penalty would be rendered patently unconstitutional [relying upon Furman v. Georgia, Gregg v. Georgia, Profitt v. Florida, and Jurek v. Texas]."")

13. **Mississippi** (weighing state/jury sentencing; instruction on statutory mitigators and general catch-all routinely given)

Statutory law

§99-101(3)(c): "In each case in which the jury imposes the death sentence,

the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section [statutory aggravating and mitigating circumstances] and upon the records of the trial and the sentencing proceeding."

§99-19-103: "The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation."

Case law

Neal v. State, 451 So.2d 743, 761 n.11 (Miss. 1984) (The use of such non-limiting "any other mitigating circumstances" instructions has been approved by this Court in *Gray v. State*, 375 So.2d 994, 1003-1004 (Miss. 1979) (approving instruction that jury was to consider as a mitigating circumstance "[a]ny other matter [besides the statutory mitigating circumstances] brought before you which you may deem mitigating on behalf of the defendant"). As a matter of practice, such language should be employed in every case to avoid this troublesome point arising in the future.) *See also Irving v. State*, 441 So.2d 846, 850-51 (Miss. 1983); *Clemons v. State*, 535 So.2d 1354, 1359-60 (Miss. 1988).

14. **Missouri** (weighing state/jury sentencing; statute requires instruction on mitigating

circumstances; uses pattern instruction)

Statutory law

§565.032.1 – "In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 of this section which are requested by the defendant and supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior convictions, and pleas and findings of guilty and admissions of guilt or pleas of nolo contendere of the defendant;"

Pattern Instruction – Missouri Pattern Instruction #313.44A

"If you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you then must determine whether there are facts or circumstances in mitigation of punishment which are sufficient to

outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial."

"As circumstances that may be in mitigation of punishment, you shall consider [relevant statutory mitigating circumstances]. You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment."

Case law

State v. Young, 701 S.W.2d 429, 437 (Mo. 1985) (en banc) (capital statute requires instruction on relevant statutory mitigating circumstance as well as on other mitigating evidence)

15. **Nevada** (weighing state/jury sentencing; jury routinely instructed on relevant statutory mitigating circumstances and catch-all)

Statutory law

§200.035 "Circumstances mitigating first degree murder. Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstances are not sufficient to constitute a defense or reduce the degree of the crime: [6 statutory mitigating circumstances with catch-all]."

Case law

McCabe v. State, 655 P.2d 536, 538 (Nev. 1982) ("A plain reading of this statute in conjunction with NRS 175.554, which outlines the procedures for conducting a separate penalty hearing, reveals that a separate penalty hearing is not required where death is not an option for the jury to consider. NRS 175.554 provides that the court shall instruct the jury on all alleged aggravating and mitigating circumstances; then the jury is to determine whether the circumstances are found to exist.")

Bondi v. State, 699 P.2d 1062, 1066 (Nev. 1985) ("The penalty jury was correctly instructed to consider six specific mitigating factors and 'any other circumstances relating to the case or to the defendant, Mr. Biondi, as reasons for not imposing the death sentence.' ")

Nevius v. State, 699 P.2d 1053, 1061 n.6 (Nev. 1985) (catch-all instruction given approvingly: "However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose the death penalty upon Mr. Nevius. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death

is not appropriate punishment in this case.")

16. **New Hampshire** (weighing state/jury sentencing; statutory command that jury consider statutory mitigating circumstances)

Statutory law

New Hampshire Revised Stat §630:5 Procedure in Capital Murder (VI) – "In determining whether a sentence of death is to be imposed upon a defendant, the jury shall consider mitigating factors, including the following: [8 statutory mitigating circumstances and a catch-all.]

17. **New Jersey** (weighing state/jury sentencing; detailed charge on mitigating circumstances required)

Case law

State v. Bey, 548 A.2d 887, 910-11 (N.J. 1988) ("The requirement that capital sentencing must not preclude consideration of relevant mitigating circumstances would be hollow without an explanation of how the evidence can mitigate the imposition of the death penalty. Otherwise, the court would subject the defendant to the risk of an arbitrary and capricious jury determination. *Gregg v. Georgia*, supra, 428 U.S. at 189. Even before enactment of the Act, we recognized that '[a]ppropriate and proper charges are essential for a fair trial' and that the charges 'should explain to the jury in an understandable fashion its function

in relation to the legal issues involved.' *State v. Green*, supra, 86 N.J. at 287, 430 A.2d 914. In sum, it is the trial court's duty to assure that a reasonable juror will understand the meaning and function of mitigating factors. A trial court is not bound to any particular language when instructing a jury on mitigating factors, but the court must adequately explain those factors 'in the text and purport of the whole charge.' . . . That requirement may be viewed as a corollary of the principle that 'faithful performance of the court's duty of expounding the law for the jury's guidance and instruction requires a plain and clear exposition of the issues.' ")

Pattern Instruction Excerpts from New Jersey Bench Manual for Capital Cases

The trial court must give clear instructions regarding the role that mitigating factors play in determining the penalty. *State v. Clausell*, 121 N.J. 298, 345 (1990) (merely explaining that the general function of mitigating factors are that they tend toward imposing a life sentence is insufficient)

The court must not merely quote from the statute when charging on mitigating factors . . . as jurors are untrained in interpretation.

[This manual includes a detailed instruction for *each* statutory mitigating factor as well as for the catch-all.]

18. **New Mexico** (weighing state/jury sentencing; clear pattern instruction on mitigating circumstances)

Statutory law

§31-20A-2. "Determination of sentence. A. Capital sentencing deliberations shall be guided by the following considerations: (1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act; (2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and (3) whether other mitigating circumstances exist."

Case law

State v. Clark, 772 P.2d 322, 339-40 (N.M. 1989) ("Clark argues that the refusal to submit to the jury his tendered instruction concerning specific *non*statutory mitigating circumstances was error. In capital cases the defendant is entitled to have the sentencing jury consider any relevant mitigating evidence. [cites omitted]. In this case, the jury was instructed pursuant to SCRA 1986, 14-7029 that it must consider 'all mitigating circumstances,' and that a 'mitigating circumstance is any conduct, circumstance, or thing which would lead you to decide not to impose the death penalty.' The instruction listed the statutory mitigating circumstances for which there was evidence, then instructed the jury that it must consider 'anything else

which would lead you to believe that the death penalty should not be imposed.' Finally, the jury was told to consider the 'character, emotional history and family history of the defendant which are mitigating.' ")

19. **New York** (weighing state/jury sentencing; court must charge on aggravating and mitigating circumstances, and jury must make findings as to each; there are no reported cases yet on this issue)

Statutory law

Criminal Procedure Law §400.27(10) – "At the conclusion of all the evidence, the people and the defendant may present argument for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. §400.27(11.b) – If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any."

20. **N. Carolina** (weighing state/jury sentencing; statute and case law require instruction on all mitigating factors – statutory and nonstatutory – that the jury would reasonably find)

Case law

State v. Lloyd, 364 S.E.2d 316, 323-24 (N.C. 1988) ("When evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in N.C.G.S. §15A-2000(b) to submit that circumstance to the jury for its consideration. Once the trial court determines that the jury could reasonably find a mitigating circumstance, the statute affords the trial court no discretion in submitting the mitigating circumstance. Our review of the issue is, therefore, limited to determining whether there was evidence in the present case which would support a reasonable finding of the mitigating circumstance of 'no significant history of prior criminal activity.' We conclude that in the case at bar such evidence was present and, under the mandates of N.C.G.S. §15A-2000(b), the trial court was correct in submitting this mitigating factor for consideration. . . . Allowing jurors to consider and weigh all of the statutory aggravating and mitigating evidence which they reasonably might find supported by the evidence is the only way to ensure that juries distinguish cases in which the death penalty properly may be imposed from those in which it may not be imposed."

"We now consider the defendant's argument that the trial court committed prejudicial error in refusing to submit the nonstatutory mitigating circumstances that the defendant had no prior record of capital offenses and that the defendant had not been convicted of a felony in the last ten years. Generally, a defendant is entitled to have a jury consider any circumstances that might have mitigating value. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898 (1987). Our legislature ensured that a defendant would have the benefit of every circumstance having mitigating value by providing that the jury always consider, in addition to other statutory mitigating circumstances, '[a]ny circumstance arising from the evidence which the jury deems to have mitigating value.' ")

21. **Ohio** (weighing state/jury sentencing; long practice of instruction on statutory mitigating circumstances and catch-all)

Pattern Instruction – Ohio Jury Instructions – Criminal #503.016(A)

"You will consider all the evidence, arguments, (the statement of the defendant), (the pre-sentence report), (the mental examination report), and all other information and reports which are relevant to the nature and circumstances of the aggravating circumstance(s) . . . or any mitigating factors including but not limited to

the nature and circumstances of the offense and the history, character, and background of the defendant and all of the following: (statutory mitigating circumstances – 6 factors and 1 catch-all)

22. **Oklahoma** weighing state; court requires basic instruction on aggravating and mitigating circumstances)

Case law

Smith v. State, 737 P.2d 1206, 1215 (Okla. 1987) ("Appellant contends that neither Oklahoma statutes nor the trial court's instructions provided the jury particularized guidelines for considering mitigating circumstance and caused the sentence of death to be unconstitutionally imposed. The jury at trial was instructed in accordance with 21 O.S.1981 §701.11, that the death penalty could not be imposed unless they found that the aggravating circumstances outweighed the mitigating circumstances. They were further instructed that mitigating circumstances were those which in fairness and mercy could be considered as extenuating or reducing the degree of moral culpability. We have previously held, and now reaffirm our position, that these instructions are sufficient to prevent arbitrary or discriminatory application of the death penalty.")

Pattern Instruction – OUJI – CR 439, p. 81 (1981)

"Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case."

23. **Oregon** (Interrogatory Texas-like sentencing system/jury sentencing; statute reformed to include a fourth question in wake of *Penry*)

Case law

State v. Wagner, 786 P.2d 93, 95, 99, 101 (Or. 1990) ("The statute does not state that these two issues (deliberateness & future dangerousness) and the one contingent issue (provocation) are the only issues that may be submitted to the jury. Indeed, although the statute only expressly provides for a mitigation instruction on future dangerousness, this court nevertheless has interpreted the statute to require the admission of mitigating evidence on all three issues *and* to allow for mitigation instructions on all three issues. *Wagner*, 305 Or. at 156-57, 161, 167, 752 P.2d 1136."

"We are thus left with circumstances in which (1) the federal constitution requires admission of all mitigating evidence; (2) the statute permits

admission of such evidence; (3) the federal constitution requires a mechanism for meaningful consideration of all mitigating evidence, including evidence beyond the scope of the statutory questions; (4) the statute permits arguments by defendant for life based on all mitigating evidence; (5) the trial court is obligated to instruct the sentencing jury on all necessary matters of law; and (6) defendant is entitled to an instruction that, notwithstanding an affirmative answer to the statutory questions, the jury may conclude that mitigating evidence justifies imposition of a life sentence."

"[In the wake of *Penry*, the Court redrafted a 4th question that had been hastily passed by the legislature to read as follows]: Should defendant receive a death sentence? You should answer this question 'no' if you find that there is any aspect of the defendant's character or background, or any circumstance of the offense, that you believe would justify a sentence less than death. In the fourth question posed above, we are asking the jury, in making its finding, to consider any mitigating aspect of the defendant's life, alone or in combination, not necessarily related causally to the offense. This does no more than to provide the sentencing jury with the data traditionally available to the sentencing

judge under the discretionary sentencing model for criminal cases.")

State v. Farrar, 786 P.2d 161, 189-190 (Or. 1990) ([Court sets out instructions to be used in future cases] "We disapprove defendant's second requested instruction that "the jury may bring back a life sentence even if no mitigating circumstances are found." At a minimum, we approve in substance defendant's first and third requested instructions, as follows:

> You may consider any aspect of defendant's life in your determination on the fourth question and any aspect of defendant's life that may be relevant in your determination of the first special issues.
>
> Defendant need not prove the existence of a mitigating circumstance beyond a reasonable doubt. If you reasonably believe that a mitigating circumstance exists, you may consider it as established."

"Additionally, pursuant to our opinion this date in *Wagner*, during the penalty phase the trial court must instruct each juror on the four issues set forth in ORS 163.150(1)(b), which statutory instructions may (but need not) read as follows:

> 1. Was the conduct of the defendant that caused the death of the

deceased committed deliberately and with the reasonable expectation that death of the deceased or another would result?

2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? In determining this issue, you shall consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

(If raised by the evidence)
3. Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

4. Should defendant receive a death sentence? You should answer this question 'no' if you find that there is an aspect of defendant's character or background, or any circumstance of the offense, that you believe would justify a sentence less than death.")

24. **Pennsylvania** (weighing state/jury sentencing; thorough pattern instructions requiring instructions on statutory mitigating circumstances and catch-all)

Case law

Commonwealth v. Cross, 496 A.2d 1144, 1152 (Pa. 1985) (Court rejects argument that statute erects mandatory scheme by distinguishing Ohio statute struck down in *Lockett*: "In contrast, by its thorough list of mitigating circumstances combined with the opportunity for the defendant to go beyond the listed mitigating circumstances and introduce any other evidence in mitigation, the Pennsylvania Death Penalty Statute clearly meets the requirements of the Eighth and Fourteenth Amendments by providing the sentencing authority with the means to give an individualized sentence which considers the character and record of the defendant and the circumstances of his offense.")

Pattern Instructions (December 1988)

15.2502E Death Penalty, Instruction Before Hearing

"(2) The sentence you will impose will depend on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Loosely speaking, aggravating circumstances are things about the killing and the

killer which make a first degree murder case more terrible and deserving of the death penalty while mitigating circumstances are those things which make the case less terrible and less deserving of death. . . . "

"(3) It may be helpful to have in mind some of the things that the Pennsylvania Sentencing Code says are aggravating and mitigating circumstances. (*Enumerate potentially relevant aggravating and mitigating circumstances*). Mitigating circumstances also include any other mitigating matters concerning the character and record of the defendant or the circumstances of his offense."

15.2505F Death Penalty, General Instruction

(1) [repeats general definition of aggravating and mitigating circumstances]

"(4) In this case, under the Sentencing Code, the following matters, if proven to your satisfaction by a preponderance of the evidence, can be mitigating circumstances: *Here the court should state the mitigating circumstances raised by the evidence. For suggestions see Instruction 15.2502G. The court should routinely include the following statement of the catch-all category:* Any other mitigating matter

concerning the character and record of the defendant or the circumstances of his offense (including but not limited to ___)."

15.2502G Death Penalty, Stating Aggravating and Mitigating Circumstances

"The court should use the statutory language when stating aggravating and mitigating circumstances as part of the subdivision (3) of Instruction 15.2502E, or subdivisions (3) and (4) of Instruction 15.2502F."

15.2502G Jury Sentencing Verdict Slip

[In paragraph 2, the court submits "the following mitigating circumstance(s) (is)(are) submitted to the jury and must be proved by the defendant by a preponderance of the evidence (list and number separately)."

25. **S. Carolina** (nonweighing state/jury sentencing; statute includes statutory mitigating circumstances and requires court to instruct on those circumstances raised by the evidence)

Statute

§ 16-3-20(c) "The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating

and mitigating circumstances which may be supported by the evidence: [10 statutory mitigating circumstances] The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation."

Case law

State v. Pierce, 346 S.E.2d 707, 710 (S.C. 1986) ("Pursuant to Section 16-3-20(C), the trial judge shall instruct the jury as to those statutory mitigating circumstances which may be supported by the evidence. The trial judge is not to be concerned with the weight of the evidence, but only with the existence of the evidence. [cite omitted] In this case, the trial judge was required by law to instruct the jury on statutory mitigating circumstances 2, 6, and 7, given the evidence showing Pierce was using drugs and extremely intoxicated during the commission of the crime.")

State v. Linder, 278 S.E.2d 335, 339 (S.C. 1981) ("Section 16-3-20(C) of the statutory complex provides that when a capital case is heard by a jury, the trial judge must, in his sentencing instructions, include 'any mitigating circumstance otherwise authorized or allowed by law and any . . . statutory aggravating and mitigating circumstances which may be supported by the evidence.' . . . The purpose here is

to assure that each sentence rendered in a capital case results from the attention of the sentencing authority having been drawn to the particularized circumstances of each case.")

26. **S. Dakota** (nonweighing state/jury sentencing; no list of statutory mitigating circumstances but clear statutory command that jury be instructed on mitigating circumstances)

Statute

§ 23A-27A-1. "Mitigating and aggravating circumstances considered by judge or jury. Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence:"

§ 23A-27A-3. "Jury to determine existence of mitigating or aggravating circumstances – Instructions to jury. Upon the conclusion of the evidence and arguments of counsel, the judge shall give the jury appropriate instructions and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in § 23A-27A-1 exist. The instructions as determined by the trial judge to be warranted by the evidence shall be

given in his charge and in writing to the jury for its deliberation."

27. **Tennessee** (weighing state/jury sentencing; state case law requirement of instruction on both statutory and nonstatutory mitigating circumstances)

Statute

§ 39-13-204(e)(1) "After closing arguments in the sentencing hearing, the trial judge shall include in the instructions to the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i) which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both which shall include, but not be limited to, those circumstances set forth in subsection (j). No distinction shall be made between mitigating circumstances set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury."

Pattern Instruction

Tennessee Pattern Instruction – Crim. 7.04(b)

Mitigating Circumstances: "Tennessee law provides that in arriving at the punishment, the jury shall consider as

previously indicated, any mitigating circumstances which shall include, but are not limited to, the following: [8 statutory mitigating circumstances and #9 the catch-all] – any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence. No distinction shall be made between mitigating circumstances one (1) through eight (8) and those other which are specifically requested by the state or defense."

Case law

State v. Miller, 771 S.W.2d 401, 404 (Tenn. 1989) ("This Court has held that only those mitigating circumstances that are raised by the evidence are to be expressly charged. *See State v. Hartman*, 703 S.W.2d 106 (Tenn. 1985); *State v. Black*, 670 S.W.2d 600 (Tenn. 1984).")

28. **Texas** (jury is directed to answer interrogatories and to consider mitigating evidence therein)

Case law

Penry v. Lynaugh, 492 U.S. 302 (1989) (instruction on mitigation required

whenever mitigating evidence has relevance beyond scope of the special issues)

Gribble v. State, 808 S.W.2d 65, 75 (Tex.Ct.Crim.App. 1990) ("whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids the imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment.")

29. **Utah** (non weighing state/jury sentencing; statute includes statutory mitigating circumstances)

Case Law

Gardner v. Holden, 888 P.2d 608, 614 (Utah 1994) ("The trial court instructed the jury on all but three of the statutory mitigating circumstances. . . . There was no factual basis for any of these mitigating circumstances; there was no fundamental unfairness on this issue.")

30. **Washington** (weighing state/jury sentencing; case law requires instruction on relevant statutory mitigating circumstances and catch-all)

Case law

State v. Bartholomew, 683 P.2d 1079, 1089 (Wash. 1984) (reading list of statutory mitigating circumstances as helpful examples of mitigation sufficient under Eighth Amendment)

State v. Jeffries, 717 P.2d 722, 736 (Wash. 1986) (trial court's instruction on mitigation: "a mitigating circumstance is a fact about the offense, or about the defendant, which in fairness or mercy, may be considered in extenuating or reducing the degree of moral culpability and punishment, although it does not justify or excuse the offense" was not error)

State v. Gentry, 888 P.2d 1105 (Wash. 1995) (preferred manner of instructing on mitigating circumstances is to include whatever statutory mitigating factors the defendant requests be included in the instructions, but not include specific non-statutory factors)

Pattern Instruction

WPOC 31.07 Mitigating Circumstances – Definition

"A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in

mercy may be considered as extenuating or reducing the degree of moral culpability of which justifies a sentence of less than death, although it does not justify or excuse the offense. The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted. You may also consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following: [statutory mitigating circumstances]"

31. **Wyoming** (weighing state/jury sentencing; statute requires instruction on mitigating circumstances)

Statute

§ 6-2-102(d) "Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstance, as defined in subsection (h) and (j) of this section. . . . "

Case law

Hopkinson v. State, 632 P.2d 79, 157, 167 (Wyo. 1981) ("Section 6-4-102(h) specifically limits the aggravating circumstances to those listed, while subsection (j) merely states that 'mitigating circumstances shall be the

following.' This means that the jury is free to consider other mitigating factors. And in this case the jury was so instructed.") ("We would also suggest that the district court instruct the jury that if they find 'other' mitigating circumstances besides those specifically spelled out, that they must articulate it so as to aid this court in determining whether any arbitrary factors have been present in the sentencing process.")

Supreme Court, U.S.
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(8)

No. 96-8400

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS McARTHUR BUCHANAN, JR.,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Would all reasonable jurists have been compelled in 1990 to accept Buchanan's claim that he unconstitutionally was denied sentencing instructions directing the jury that certain evidence was "a fact which mitigates" the death penalty, even though Buchanan was allowed to present any relevant mitigating evidence he desired, his counsel was allowed to argue that the evidence mitigated against the death penalty, the jury was directed to consider all the evidence and reject a death sentence if not justified even though an aggravating factor had been found, and the jury certified that it in fact had considered the evidence in mitigation before rendering its verdict?

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STATEMENT OF THE CASE

Ten years ago, on September 15, 1987, Douglas Buchanan, in a two-hour span in Amherst, Virginia, savagely murdered his father, step-mother and two step-brothers who were ten and thirteen years old. Buchanan planned the murders with his wife, and drove to his father's home on September 14, but decided not to carry out the plan that day. On September 15, he and his wife drove to a secluded area on the Blue Ridge Parkway. His wife stayed in the car while he walked to his father's house, armed with a loaded .22-caliber rifle and carrying gloves which he wore during the murders. He killed his father by shooting him with the rifle, once in the back of his head and a second time between his eyes, both shots fired at point-blank range. Buchanan dragged his father's body to a bedroom where he found a loaded .22-caliber pistol and lay in wait for the other family members to return home. (JA 79-80).

Fifteen minutes later, when his step-brothers arrived from school, Buchanan, who was hiding behind the front door, killed ten-year-old Donnie with the pistol as he came inside. Buchanan shot Donnie once in the back of his head and a second time in his right temple. Thirteen-year-old J.J. heard the shots from the yard and tried to run away, but Buchanan pursued him and shot him twice with the pistol. Under the pretense of helping the wounded boy, Buchanan was able to get J.J. inside the house where he then shot him a third time in his forehead. (JA 80).

Buchanan dragged the two boys' bodies to the bedroom, but J.J., miraculously still alive, got up and tried to get away. Buchanan, however, took a knife from the kitchen and killed him by stabbing him five times, twice

in the head and neck. Buchanan later described J.J. as a "tough kid" who just would not die. (Tr. 1501).

Finally, Buchanan ambushed his step-mother when she arrived home a short time later. He shot her once in the head with the pistol and then repeatedly stabbed her with the knife. He stabbed her four times in her chest and finally slashed her throat open down to her vertebrae, almost decapitating her. (JA 80-81).

Buchanan and his wife fled the State but were apprehended later in New Mexico. After initially denying his guilt, Buchanan fully confessed to the murders and never since has denied his guilt. During the guilt stage of trial, Buchanan's lengthy confessions were admitted into evidence and Buchanan himself testified about how he had accomplished the murders. (Tr. 773-918; 1070-1162). Buchanan was tried by a jury in the Circuit Court of Amherst County and found guilty of the premeditated murder of his family in a single transaction, a capital crime in Virginia. *See* Va. Code § 18.2-31(7) ("The willful, deliberate, and premeditated murder of more than one person as a part of the same act or transaction").

Before the separate sentencing hearing on the capital murder convictions required by Virginia Code § 19.2-264.3, the prosecutor had determined that he would be asking for the death penalty based solely on one of Virginia's two aggravating factors: "that [the defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." *See* Va. Code § 19.2-264.4(C). At the beginning of the capital sentencing hearing, the court instructed the jury that it would be determining whether Buchanan would receive a life or death sentence and that,

at the conclusion of the evidence, it would receive written instructions and a written verdict form. The court also instructed the jury that the parties had stipulated that the jury should consider, as part of the sentencing evidence, all the evidence already considered during the guilt phase of the trial. (JA 24-25). That evidence proved how the murders had been planned and carried out, as well as how the wounds had been inflicted, and what wounds had been inflicted on each victim.

In his opening statement at the sentencing phase, the prosecutor told the jury that he would be asking for the death penalty based upon the "vileness" of the crimes. (JA 25-26). He also "conceded" that the defendant had had a troubled childhood (JA 26) and that the defendant would be presenting psychiatric and other evidence. He then stated as follows:

> What you will have to do at the end of this hearing, is you will have to balance, as we suggested early on – you will have to balance these things that are in his favor against these horrible things that he has done. And you will have to weigh – you will have to decide what the case is worth.

(JA 27). In his opening statement, Buchanan's attorney announced to the jury, "I'm allowed to put on mitigation." (JA 29). He outlined generally what the defendant's mitigating evidence would be and told the jury he would be asking "that this man, Doug, not be executed because of the mitigation that we are going to present." (JA 29).

For two days, the jury then heard evidence from seven defense witnesses and eight prosecution witnesses. Buchanan's witnesses recounted in detail the circumstances of his childhood, including the fact that his mother had died from a fatal disease when Buchanan was

a boy, that his father had remarried and that his father and step-mother had prevented him from having contact with his grandparents, aunt and cousins who lived nearby. (Tr. 1256-1347).

Buchanan also presented extensive testimony from Dr. Brown, a psychiatrist, regarding the impact these events had had on him. Dr. Brown explained that he had been appointed by the court to evaluate Buchanan. (Tr. 1371). He opined that Buchanan was under extreme emotional stress at the time of the offenses, stress that had resulted from the manner in which the family had dealt with, and reacted to, events after his mother's death. (Tr. 1380). He admitted that the personality test he had administered showed that Buchanan had a "very high score on what is known as a psychopathic deviancy scale," but concluded that he was not a psychopath. (Tr. 1390-1391). On cross-examination, Dr. Brown also admitted that the tests showed Buchanan was immature, impulsive, hedonistic, rebellious, hostile, aggressive, frustrated, unable to learn from punishing experiences and tended repeatedly to get into the same types of trouble. (Tr. 1418-1419).

In rebuttal, the prosecution presented the testimony of, among others, two mental health experts, Drs. Lee and Gwaltney. These experts agreed generally with the factual events of Buchanan's life but not their effect on his commission of the crimes. Dr. Lee explained that he had been appointed by the court to evaluate Buchanan "with respect to mitigation in event of a capital murder conviction." (Tr. 1484). He opined that, while Buchanan was the victim of a tragic childhood, there was no evidence that the trauma of his mother's death was great, given the fact that from the age of two until her death when he was

nine, his grandparents had played a major role in his upbringing. (Tr. 1492). He also testified that, considering the facts of how the crimes had been carried out with planning and deliberation, there was no evidence that Buchanan was "acting under any form of severe emotional disturbance or that his mental state was affecting his judgment." (Tr. 1498). Dr. Lee concluded that at the time of the crimes, Buchanan "was functioning with [the] purpose of carrying out the original thing he mentioned – that they had talked about – having to settle things with his family, that they all deserved killing." (Tr. 1499).

Dr. Gwaltney explained that he too had been appointed by the court to evaluate Buchanan for "mitigating factors" under the "statutes." He told the jury he had been directed to look at "[a]nything about his background history, character, experiences," and specifically to determine "whether at the time of the offense, he was suffering from an extreme mental or emotional distress or disorder." (Tr. 1532). He further explained that he was directed also to determine "whether at the time of the offense he was so impaired that he could not . . . conform his behavior to the standards of law." (Tr. 1532).

Dr. Gwaltney testified that "there are many relevant factors in mitigation concerning his history and character that the trier of fact may – and I underline may – find relative to sentencing issues." (Tr. 1537). Like Dr. Lee, he believed that, considering the facts of the crime (including the planning, the parking the car away from the house, wearing gloves and hiding the bodies), Buchanan's capacity to conform his behavior to the requirements of the law was not significantly impaired and that Buchanan did not act under extreme mental or emotional disturbance at the time. (Tr. 1540, 1542). In fact,

while admitting that Buchanan might have acted with stress or excitement, Dr. Gwaltney testified that the type of methodical, well-organized behavior Buchanan exhibited could not have occurred if he had been under ***extreme*** distress. (Tr. 1542-1543).

The Commonwealth and Buchanan agreed (JA 39) that the court should instruct the jury with Virginia's pattern capital sentencing instruction that reads as follows:

> You are instructed that you have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or life imprisonment.
>
> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then ***you may fix the punishment*** of the defendant at death or if you believe from ***all the evidence*** that the death penalty is not justified, then you ***shall fix the punishment*** of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then

> you shall fix the punishment of the defendant at life imprisonment.
>
> In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

(JA 41-42)(emphasis added).

Buchanan tendered several other jury instructions to the court which were refused. Among those refused were four which specified certain circumstances - "no significant history of prior criminal activity," "extreme mental or emotion disturbance," a significant impairment of capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," and Buchanan's age - and which unequivocally instructed the jury that each circumstance was ***"a fact which mitigates against imposing the death penalty."*** (JA 74-76) (emphasis added). The court also refused a fifth instruction that told the jury to "consider the circumstances surrounding the offense, the history and background [of Buchanan] . . . and any other facts in mitigation of the offense." (JA 74). Buchanan argued that he was entitled to instructions that contained the mitigation factors set out in Virginia's sentencing statute.[1] The court, however,

---

[1] At the time of Buchanan's trial, Virginia Code § 19.2-264.4(B) (1983 Repl. Vol.) provided, in pertinent part, that "Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act,

refused the proffered instructions, noting that it was not proper to give instructions that singled out certain mitigating factors to a sentencing jury, according to precedent of the Supreme Court of Virginia. (JA 39-40).

In the extensive closing argument by the Commonwealth, the prosecutor told the jury it would have to decide between a life or death sentence and that the Commonwealth had to prove the aggravating factor beyond a reasonable doubt. (JA 42-43). He also acknowledged openly that the ***jury was required to consider Buchanan's mitigating evidence***. In pertinent part, he told them:

> In fairness to the defendant, understand that even if you find that there was the vileness that you do not have to return the death sentence. I will not suggest that to you. You are entitled to impart your personal judgment just as much as applying the law in deciding which punishment is fair.
>
> * * *
>
> But that's not the whole story. Then you've got to consider what you have heard the last day and a half - ***mitigation***, history, the things about the defendant, many of which he told you in his statements. You had that information when you went into the jury room on Thursday night. But we have heard it expanded, more clearly defined. We have some agreement among professional psychologists and psychiatrist. We have some disagreement.

---

or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

* * *

> And so, ladies and gentlemen, the question comes down after you look at all of this evidence and I hope the answer is obvious to you.
>
> * * *
>
> [Dr. Gwaltney] had – he said – let's deal with the first one, was ***mitigating*** circumstances – and he admits, as does the Commonwealth, that there were some crummy things that happened to this young man in his home life. Then he was asked to deal with whether, at the time of the event, he was under extreme emotional – under the control of extreme emotional factors.

(JA 43-44, 57-58) (emphasis added).

The defense also made a lengthy closing argument in which it urged the jury to return a life sentence based upon the evidence in mitigation:

> Now, there is something in the law that's called ***mitigation***. Now ***mitigation*** – that doesn't mean that he is – that doesn't mean that he's making an excuse. ***Mitigation*** is not excuse. There's no excuse for what he did. But there – the law in its wisdom has given a jury and the court – if it's in the breast of the court – a way to weigh all the facets of a man's background, and the facets of any pressure that he happened to be under at the time that the act that he's charged with occurred. And if they think, in their wisdom, that there is some factor that has redeeming value or there is some factor that means that he has some, not excuse – but some reason not to get the death penalty, then you have a right to take that into consideration and give him life in prison.
>
> Now, the court – the jury – I keep saying the court, but the court and the jury can consider

almost anything. There are certain facts that are set down in the statute, but practically any factor can be considered in ***mitigation***.

Now, one of the factors, for example, is youth. That's set in the code. Youth is one of the factors that you can take into consideration.

* * *

I mean he's nineteen years of age and these psychiatrists and psychologists here said that he might be amenable to rehabilitation. So that is – that's one factor you can take in consideration when you come to your decision –

* * *

Now, the other things that you can take in consideration, and I'm going to read them because I don't want to mislead you in any way. . . . The others – he had no criminal record. Does the man have a criminal record? Now Doug Buchanan has no criminal record.

* * *

As I said, there are all sorts of facts you can take into consideration. But I'm going to read to you three others. We call your attention to three others. One of them – the second one that I would like to call your attention to – is that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

* * *

So I suggest to you that the emotional disturbance, mental and emotional disturbance – and what this jury has got to decide is whether that was enough to mitigate this terrible, terrible crime.

* * *

But a decision of whether he should go to the electric chair shouldn't be made because you are mad. That's not what it is made on. It's made on whether there is ***mitigating*** circumstances. Not excuse, but ***mitigating*** circumstances.

* * *

I'm going to another one of the requirements. At the time of the commission of the capital felony – the felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

* * *

The existence of a single ***mitigating*** circumstance – if you don't believe but there is one ***mitigating*** circumstance, you can find that this boy – this boy should have a life sentence. That's all you have to have. The Commonwealth – if you will notice that the Commonwealth – if you can believe that this ***mitigation*** is enough to spare his life, you can do it. The Commonwealth has to prove all of their things in the instruction that all this was heinous and all, but if you believe that Doug had one ***mitigating*** thing, for example, you can – you can spare his life.

(JA 59-61, 64-66, 68) (emphasis added).

In rebuttal, the prosecutor argued that, despite the mitigating evidence, the appropriate sentence was death:

> He has talked about this concept of ***mitigation*** and he has talked about the fact that he admits guilt.
>
> * * *
>
> And I don't want you to be misdirected or misled about this concept of ***mitigation***. ***Mitigation*** is a balancing proposition. It is not a directory type of proposition. ***If the only question was is***

there mitigation, we could have stopped back on Thursday night. Even Dr. Lee and Dr. Gwaltney says yes, there is some ***mitigating*** circumstances. So don't be misled. This is not a proposition that if you find that there is some ***mitigation*** in it, that he had a crummy childhood, that he had parents who were not the best of parents, that he had a family situation that was not the best of family situations, that doesn't mean you have to come back in here with less than the maximum penalty. You've got to balance it. You've got to balance it.

* * *

Now, Mr. Poindexter attacks the statements and he says that they showed that he was under extreme emotional disturbance or distress and that's a ***mitigating*** circumstance. Remember Dr. Gwaltney's testimony this morning? Dr. Gwaltney says that there are relevant factors in ***mitigation*** concerning his history and character that the trier of fact – that's you folks – may find relative at sentencing issues. But he goes on to say there is no indication that at the time of the offenses, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

* * *

Well, I am not going to sit here and argue to you that Douglas McArthur Buchanan, Jr., wasn't hyped up, wasn't emotionally aroused when he was about the act of killing someone. . . . But does that ***mitigate*** it?

* * *

Ladies and gentlemen, one thing that probably Mr. Poindexter and I agree about is this, and that is, that what you have to do, you have to

balance. If you believe the crime was vile, I am not going to sit here and suggest to you that you must bring back a sentence of death. That is not the law. You are entitled to follow your own caprice. You are entitled to consider all of the facts, the history, the ***mitigating*** circumstances, and all of those things. But what I suggest to you is this. I suggest again that you must bring back a sentence of death in this case because it is the only – it is the only reasonable sentence that can be given for acts such as this.

(JA 68-71) (emphasis added). The court then finally charged the jury again that it had two sentencing options reflected in the two written verdict forms and instructed the jury to retire with the verdict forms, instructions and all the exhibits in the case. (JA 72).

The jury ultimately returned with the following verdict:

> We, the jury on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Douglas Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously and wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and ***having considered the evidence in mitigation of the offense***, we unanimously fix his punishment at death. Signed Myra T. Ramsey, Foreman.

(JA 77) (emphasis added). After the verdict was read by the clerk in open court, the trial judge questioned the jury as follows:

> All right, now, members of the jury, you've heard your verdict read by t' Clerk. Is that the verdict of each and every on of you?

(Tr. 1662). After receiving an affirmative response, the judge asked each juror individually if the verdict was his or hers, to which question each responded affirmatively. (Tr. 1662-1664). Pursuant to Virginia Code § 19.2-264.5, the court subsequently conducted a second sentencing proceeding in which it imposed the sentences which had been fixed by the jury. Final judgment was entered on August 19, 1988.

On appeal to the Supreme Court of Virginia, Buchanan argued, among other things, that the trial court's refusal to give his proffered instructions on mitigating factors denied him due process as well as his rights under the Sixth, Eighth and Fourteenth Amendments. On September 22, 1989, in a unanimous opinion, the Virginia Supreme Court rejected Buchanan's claim of error based upon its precedent in *Watkins v. Commonwealth*, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986). *See Buchanan v. Commonwealth*, 238 Va. 389, 416-417, 384 S.E.2d 757, 773 (1989). (JA 84). The Court affirmed Buchanan's capital murder conviction and death sentence. *Buchanan*, 238 Va. at 418, 384 S.E.2d at 774. Buchanan filed a petition for a writ of certiorari in this Court but did not present his "mitigation/instruction" claim. (Pet. No. 89-6107). On January 22, 1990, this Court denied certiorari review. *Buchanan v. Virginia*, 493 U.S. 1063 (1990).

Buchanan then filed a petition for a writ of habeas corpus in the Circuit Court of Amherst County that was dismissed on December 19, 1991. His subsequent petition for appeal to the Virginia Supreme Court was refused on June 25, 1992. In these petitions for collateral review, Buchanan raised the "mitigation/instruction" claim he had raised on direct appeal. The state courts refused to relitigate the claim. (Va. Sup. Ct. Order 6/25/92). (JA 1).

On petition for certiorari review of the state habeas corpus case, Buchanan presented virtually the same argument on the "mitigation/instruction" claim that is now under review. (Pet. No. 92-6018). This Court denied certiorari review of the state habeas corpus case on November 16, 1992. *Buchanan v. Murray*, 506 U.S. 988 (1992).

Buchanan then filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia. The district court dismissed the petition on January 25, 1996. (JA 85). The district court rejected the "mitigation/instruction" claim based upon binding precedent of the United States Court of Appeals for the Fourth Circuit. (JA 110-112). On appeal to the Fourth Circuit, a panel of the court unanimously affirmed the district court's dismissal on December 30, 1996. *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996). Relying on its prior caselaw from as early as 1984 that had analyzed Virginia's sentencing scheme and instructions, the Court of Appeals found again that Virginia's instructions and verdict form comported with the Eighth Amendment. (JA 204-205). The Court of Appeals denied Buchanan's petition for rehearing and suggestion for rehearing in banc on January 27, 1997, with no member of the court requesting a poll on the suggestion for in banc review. (JA 215).

On February 10, 1997, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Amherst County set Buchanan's execution for April 8, 1997. On March 27, 1997, Buchanan filed the current petition for a writ of certiorari and an application for a stay of execution. In his petition, Buchanan raised three questions: (1) the same "mitigation/instruction" question he had raised in his previous petition for a writ of certiorari (No. 92-6018); (2) whether due process required the trial court to instruct the jury on mitigating factors contained in Virginia Code § 19.2-264.4(B); and (3) whether the trial court improperly had sustained a hearsay objection to a portion of his sentencing expert's testimony.

On April 8, 1997, this Court stayed the execution. On April 28, 1997, the Court granted the petition, limited to Question No. 1, whether the trial court had violated the Eighth Amendment by refusing Buchanan's proffered sentencing instructions on mitigation.

SUMMARY OF ARGUMENT

The Eighth Amendment's requirement for individualized sentencing in the "selection phase" of a capital murder proceeding differs markedly from its requirements for the "eligibility phase" of sentencing. The Amendment requires the States to adopt guidelines for the "eligibility phase" which narrow or channel the sentencer's discretion to impose the death penalty, but allows exactly the opposite for the "selection phase" because the sentencer must be given broad discretion to consider all relevant facts presented in mitigation regarding the ultimate decision to impose sentence. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Buchanan makes no complaint about Virginia's requirement that the jury's discretion be sufficiently guided at the "eligiblity phase" by requiring the finding of one of two aggravating factors beyond a reasonable doubt. Instead, he complains that his jury also was not sufficiently guided in the "selection phase" because the court refused to instruct his jury that if it found a specific circumstance to be true then that "is a fact which mitigates against imposing the death penalty." (JA 74-76).

The Virginia Supreme Court and the Fourth Circuit properly rejected the claim because Buchanan's jury was instructed to consider all the evidence and to impose a life sentence if it believed the death penalty was not justified, even if it had found the aggravating factor to exist. Moreover, the jurors individually expressly adopted the written verdict form which had been read to them in open court and which contained the certification that they had "considered the evidence in mitigation of the offense."

Under precedent existing in 1990 when Buchanan's case became final, as well as current precedent, a non-weighing State like Virginia was not required to instruct on specific mitigating factors so long as the jury was not prevented from considering mitigating evidence and especially where, as in Virginia, the jury was given unfettered discretion at the "selection stage" to impose a life sentence. *See Tuilaepa v. California*, 512 U.S. 967, 978 (1994); *Zant v. Stephens*, 462 U.S. 862, 889 (1983). Buchanan may not obtain relief in this collateral proceeding because it cannot be said that no reasonable jurist could have rejected his claim in 1990.

ARGUMENT

THE EIGHTH AMENDMENT NEVER HAS DICTATED THAT A SENTENCING JURY MUST BE INSTRUCTED TO CONSIDER SPECIFIC FACTS AS CONSTITUTING MITIGATION.

The utter lack of merit in Buchanan's claim, and the reasons why this Court may not grant relief in this collateral proceeding, are apparent once it is determined exactly what Buchanan seeks. In this regard, it is important to define not only what his claim is, but what it is not.

Buchanan argues on brief repeatedly that his jury was not given any instruction "explaining the concept of mitigation." (Pet. Br. at 13, 16, 20, 23 n.15, 24, 25, 27, 28, 29). The petitioner, however, never asked the state trial or appellate court for an instruction defining in general terms the "concept of mitigation." At trial, he ***agreed*** that Virginia's pattern sentencing instructions should be given and then asked the court additionally to instruct the jury that four specific factors each "mitigates against imposing the death penalty." (JA 75-76). The basis for Buchanan's request was that the factors were set forth in Virginia Code § 19.2-264.4(B) and he, therefore, supposedly was entitled to tell the jury what the statute said. (JA 39-40). Except for the addition of a general citation to the federal Constitution, his argument on direct appeal to the Virginia Supreme Court was the same. Thus, the only question properly before the Court in this collateral case is whether the Virginia Supreme Court reasonably found that the Eighth Amendment did not require Buchanan's jury to be instructed, as he had requested, that specific evidence did in fact mitigate against imposition of the death penalty. On that question, the law is clear.

A. The Eighth Amendment's Requirement Of Individualized Sentencing Does Not Dictate To The States That Juries Must Be Told That Certain Facts Are Mitigating.

Whether couched in terms of a request for a general instruction on what "mitigation" means - a request never made in this case - or in terms of a request for instruction on specific mitigating factors, Buchanan's claim is doomed under this Court's dispositive precedents which have delineated clearly the requirements for the "selection phase" of a capital sentencing proceeding. This Court has not been misled in the past by petitioners who have attempted to blur the distinction between the narrowing and channeling requirements for the "eligibility phase" of the sentencing proceeding and the contrary requirements in the "selection phase," and it should not be misled now by Buchanan.

In *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan's opinion for the Court held as follows:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by . . . history. . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

402 U.S. at 204. With respect to the individualized sentencing required in the "selection phase" of a capital sentencing proceeding, this holding is as authoritative today as it was in 1971. One year later, however, the Court struck down the death penalty statutes in forty

States as well as the federal government because the then-existing sentencing schemes did not channel and limit the sentencer's discretion to find defendants eligible for the death penalty in the first place. *See Furman v. Georgia*, 408 U.S. 238, 309-313 (1972) (opinions of Stewart, J. and White, J.).

Since *Furman*, this Court has insisted that States provide clear standards that guide the sentencer's discretion, prevent arbitrariness and administer the death penalty in such a way that rationally can distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. The post-*Furman* statutory schemes which have been found to meet these requirements are varied. Some States, like Florida, have chosen to employ a weighing system in which its sentencing juries and judges must make particular findings of the existence of specified aggravating and mitigating factors and then weigh them to see which side of the scales prevails. *See Proffitt v. Florida*, 428 U.S. 242, 246 (1976).

Other States, like Georgia, California and Virginia[2], have opted for a non-weighing system. In Georgia, a person found guilty of murder becomes eligible for the death penalty upon the jury's finding of a specified aggravating factor; however, "absolute discretion" then is given the jury in the "selection phase" to refuse to impose the penalty upon its consideration of all evidence in mitigation of punishment. *See Zant v. Stephens*, 462 U.S. at 870-872. And in California, the defendant's eligibility for the death penalty is determined in the guilt phase of trial by a finding that he committed murder plus a "special

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[2] Virginia's particular system is discussed in detail below in Argument B.

circumstance," after which the punishment is selected through the sentencer's consideration of a number of specified factors, although the factors are not identified for the jury as either "aggravating" or "mitigating." *See Tuilaepa*, 512 U.S. at 969.

In every approved system, the Court has found the Eighth Amendment satisfied where "the scheme provides for categorical narrowing at the ***definition stage***, and for individualized determination and appellate review at the ***selection stage***." *Zant*, 462 U.S. at 879 (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (Stewart, J.). Concerning the "selection stage," the Court has made clear that the fact-finder may not be ***precluded*** from considering, and may not ***refuse*** to consider, any relevant mitigating evidence. *See Eddings*, 455 U.S. at 113-114; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *Lockett* "requires the sentencer to listen." *See Eddings*, 455 U.S. at 155 n.10. However, "the absence of legislative or court-imposed standards to govern the jury in weighing the significance of . . . aggravating circumstances does not render the . . . capital sentencing statute invalid. . . . " *Zant*, 462 U.S. at 880.

Significantly, once the sentencer's discretion properly has been channeled by narrowing the class of persons for whom the death penalty is possible and has allowed the sentencer to consider all relevant evidence presented by the defendant as mitigating against imposition of the death penalty, this Court ***never has held that*** the sentencer also then must be instructed specifically that particular evidence is in fact mitigating. Indeed, the Court has held exactly the opposite.

In *Tuilaepa*, the prisoner argued that certain of California's sentencing factors were violative of the Eighth

Amendment because they instructed the jury to consider an "open-ended subject matter" rather than requiring it to answer a factual question as to whether the factor constituted mitigation. 512 U.S. at 978. The Court, however, in an opinion joined by six Justices, made clear that while the Eighth Amendment encompasses two separate procedural aspects of capital sentencing - the eligibility decision and the selection decision, *id.* at 971 - the "channeling" requirement for eligibility factors simply does not apply to the "selection phase" of the process. *Id.* at 977-978. The Court held that, "at the selection stage, the States are not confined to submitting to the jury specific propositional questions." *Id.* at 978.

Citing *McCleskey v. Kemp*, 481 U.S. 279, 315 n.37 (1987), *Tuilaepa* reiterated that " 'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at 979. Citing both *Zant*, 462 U.S. at 875, and *Barclay v. Florida*, 463 U.S. 939, 948-951 (1983), the Court concluded that,

> Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty."

Tuilaepa, 512 U.S. at 979-980. Then, in an opinion concurring in the judgment, and joined by Justice Ginsburg, Justice Stevens wrote as follows:

> The question is whether, in addition to adequately narrowing the class of death-eligible defendants, the State must channel the jury's sentencing discretion when it is deciding whether to impose the death sentence on an eligible defendant by requiring the trial judge to characterize relevant sentencing factors as aggravating or mitigating. In *Zant* we held that the incorrect characterization of a relevant factor as an aggravating factor did not prejudice the defendant; it follows, I believe, that the failure to characterize factors such as the age of the defendant or the circumstances of the crime as either aggravating or mitigating is also unobjectionable.

Tuilaepa, 512 U.S. at 981 (Stevens, J., concurring in judgment).

Tuilaepa thus is dispositive of Buchanan's claim, for in it, eight Justices stated in the clearest terms that the strictures placed on the eligibility determination, including the necessity for specific narrowing instructions and fact-finding, not only play no part in the "selection phase," but actually could run afoul of the *Lockett-Eddings* rule that allows, if not mandates, complete discretion in the sentencer's ultimate decision to give life or death. *See, e.g., Lockett*, 438 U.S. at 622 (White, J., concurring and dissenting in part) ("The Court has now completed its about-face since *Furman*. . . . "); *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) ("To acknowledge that 'there perhaps is an inherent tension' between [the *Lockett-Eddings*] line of cases and the line stemming from *Furman*, . . . is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II").

But even considering only pre-*Tuilaepa* cases it is clear that what Buchanan is asking for never has been part of the constitutional requirements for the "selection" process. This Court steadfastly has refused to expand the Eighth Amendment to require States to give specific

instructions on mitigating circumstances. In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), for example, the prisoner argued that the trial court's refusal to give instructions on mitigation violated the Eighth Amendment right to present, and have considered, mitigating evidence. Under the Texas "special issues" scheme, no mention of "mitigation" was made to the jury and, other than the two special issues presented to the jury, the court merely instructed it to arrive at a "verdict based on all the evidence." 487 U.S. at 170. The petitioner did not complain that he was denied the opportunity to present mitigating evidence or that his jury was instructed to ignore his evidence; rather, he argued that, under *Lockett*, the "special issues" alone were insufficient to allow the jury to give full consideration to his mitigation or to give it "independent mitigating weight." *Id.* at 171-172. This Court rejected the challenges, finding that, even after *Lockett*, the "special issues" had been found to "allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion." *Id.* at 182, *quoting Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988).

Similarly, in *Boyde v. California*, 494 U.S. 370 (1990), the prisoner argued that an instruction to consider circumstances which extenuate the gravity of the crime did not allow the jury to consider mitigating evidence of his background and character or to decline to give the death penalty even if the aggravating factors outweighed the mitigating ones. Citing *Blystone v. Pennsylvania*, 494 U.S. 299 (1989), the Court rejected Boyde's claim because "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence," without instruction on a

specific factor. *Boyde*, 494 U.S. at 377. The Court went on to repeat that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " *Id., quoting Franklin*, 487 U.S. at 181. Indeed, in *Johnson v. Texas*, 509 U.S. 350 (1993), the Court held that "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." 509 U.S. at 361, *quoting McCoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment).

The Court in *Boyde*, moreover, fashioned a standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of mitigating evidence: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. In Boyde's case, the challenged instruction was upheld because it did not prevent argument on, or consideration of, Boyde's background and character evidence. Moreover, the Court found it unlikely that the jury had believed that the challenged instruction had turned four days of listening to defense evidence into a "virtual charade." *Id.* at 383, *quoting California v. Brown*, 479 U.S. 538, 542 (1987). And the Court also noted that the prosecutor explicitly had accepted Boyde's character evidence as a proper factor to weigh, but nevertheless had argued (properly) that the factor did not deserve much weight in the balance. *Boyde*, 494 U.S. at 385. Under *Tuilaepa* and *Boyde*, the Virginia Supreme Court's decision

to refuse Buchanan's request for specific mitigation instructions was well within the bounds of what the Eighth Amendment commands. *See Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) ("Within these constitutional limits, 'the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished' ").

B. Virginia's Capital Sentencing Scheme Satisfies The Eighth Amendment.

Virginia's post-*Furman* sentencing scheme for capital cases demonstrates its compliance generally, and in Buchanan's case specifically, with the dictates of the Eighth Amendment. In fact, in many significant ways, it is identical to the Georgia sentencing scheme that consistently has been approved by this Court.[3] In Virginia's first post-*Furman* case, the Virginia Supreme Court described Virginia's statutory scheme. *See Smith v. Commonwealth*, 219 Va. 455, 471, 248 S.E.2d 135, 145-146 (1978), *cert. denied*, 441 U.S. 967 (1979). Four separate

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[3] Georgia analogizes its scheme to a pyramid. To reach the apex of the pyramid and merit a death sentence, the homicide must pass through three divisional planes: the first, lower plane separates murder from all other homicides, the crimes are defined by statute and the jury makes a factual finding as to the grade of homicide; the second, higher plane separates death-eligible murders from all other murders by the jury's factual finding as to what statutory aggravating factor exists; the apex, or third, plane divides death-eligible murders into those where a death sentence will be imposed and those where a life sentence will be imposed by vesting "absolute discretion" in the sentencer to establish the plane. In the final determination, the sentencer makes no findings except to determine sentence. *See Zant*, 462 U.S. at 870-872.

proceedings must occur before a sentence of death can be executed. First, the jury must determine whether the defendant is guilty of capital murder, a Class 1 felony, or of a lesser offense.[4] *Id*. Second, if the jury finds the defendant guilty of capital murder,

> there must be a second trial by the same jury to determine the issue whether the penalty should be death or imprisonment for life. Bearing upon that determination, the jury may hear evidence concerning circumstances surrounding the offense, the history and background of the accused, and facts in mitigation of the offense. For illustrative purposes and not by way of limitation, five mitigating circumstances are expressly listed.
>
> The jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense. . . . ***It is clear from the statutory context that, even when the Commonwealth establishes either or both aggravating circumstances, the jury is at liberty, in consideration of circumstances in mitigation, to recommend a sentence of imprisonment for life.***
>
> The penalty verdict must be in writing in one of two prescribed forms – one for a life sentence and the other for a death sentence. The latter

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[4] For purposes of punishment and sentencing, the Virginia General Assembly has divided all felonies into six classes. Va. Code § 18.2-9. Only Class 1 felonies are punishable by death, Va. Code § 18.2-10, and only certain aggravated murders defined as capital murder constitute Class 1 felonies. *See* Va. Code § 18.2-31 (the "willful, deliberate, and premeditated killing" of a person in conjunction with the commission of another specified felony or specified circumstance, such as Buchanan's murder of more than one person in the same act or transaction).

> contains a recitation of a finding of either "dangerousness" or "vileness" ***and a statement that the jury has considered evidence in mitigation of the offense***.

Smith, 219 Va. at 472-473, 248 S.E.2d at 145 (emphasis added); *see also Turner v. Murray*, 476 U.S. 28, 34 (1986) (noting that Virginia's sentencing scheme requires the jury to find at least one aggravating factor and to consider any mitigating evidence before fixing the sentence at death, and that Virginia juries enjoy "greater discretion than other systems" because the jury may impose a life sentence even if it finds an aggravating factor and no mitigating evidence has been offered).

Third, if the jury recommends the death penalty, the trial judge must order a probation officer to prepare a report on the history of the defendant and, after provision and notice of the report to the defendant, must conduct a hearing in which the probation officer is made available for cross-examination and the defendant may present any other additional relevant evidence. *Smith*, 219 Va. at 472-473, 248 S.E.2d at 146; *see also* Va. Code § 19.2-264.5. Upon "good cause shown," the judge may reduce the sentence to life imprisonment. *Id.*

Fourth, if the trial judge affirms the sentence of death, the defendant is entitled to an automatic appeal of the sentence to the Virginia Supreme Court and to priority placement on the Court's docket of appeals. *See* Va. Code § 17-110.2. The Virginia Supreme Court is required to determine whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the penalty is excessive or disproportionate to other similar cases, considering both the crime and the defendant. *See* Va. Code § 17-110.1; *Smith*, 219 Va. at 473, 248 S.E.2d at 146.

Virginia's pattern sentencing instruction (set forth above at p. 6) has been upheld as constitutional, uniformly and repeatedly by the Virginia Supreme Court and the Fourth Circuit. In *Smith*, the Virginia Supreme Court rejected the defendant's claim that the instruction emphasized aggravating factors and thereby called for a mandatory death sentence. The Court concluded that "read as a whole, [the instruction] fairly expounds the thrust of the statute," and that by telling the jury it "may fix" punishment at death, the jury obviously is at liberty not to do so. *Smith*, 219 Va. at 479-480, 248 S.E.2d at 150.

In *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), *cert. denied*, 444 U.S. 1049 (1980), the defendant argued that the jury was "led" into finding aggravating factors because those two factors were listed for the jury, whereas the mitigating factors were not. The Virginia Supreme Court rejected the challenge as follows:

> The requirement of the statute that the aggravating factors be listed and that discretion in sentencing be suitably directed and limited so as to minimize the risk of arbitrary and capricious action, is dictated by the holding in *Furman v. Georgia*, 408 U.S. 238 (1972), and in *Gregg, supra*.
>
> The listing of aggravating factors benefits the accused because the jury is thereby limited to a consideration of statutory aggravating circumstances. On the contrary, a jury is not so limited in considering mitigating factors, but may consider any and all mitigating factors. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Id.[5]

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[5] In an unbroken, unanimous line of authority from *Clark* to the present day, the Virginia Supreme Court has adhered to its

In *Buchanan*, the Virginia Supreme Court restated its settled holding:

> The rule that the mitigating factors mentioned in the statute must not be listed is intended to benefit the defendant. If the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation. But the intent of the statute is to leave the jury free to consider, in mitigation, whatever the jury deems appropriate. *Watkins*, 229 Va. at 491, 331 S.E.2d at 438; *Clark*, 220 Va. at 212, 257 S.E.2d at 790.

(JA 84).

The Fourth Circuit, of course, is the federal court most familiar with, and therefore better able to interpret, the law of Virginia. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988). That court also unanimously and repeatedly has rejected Buchanan's claim. In *Briley v. Bass*, 750 F.2d 1238, 1241-1245 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985), the Court of Appeals considered and rejected Briley's claim that the Virginia pattern instruction did not adequately charge the jury to consider mitigating circumstances:

> ***All the evidence***, we believe, necessarily means that the jury was to consider the evidence presented in mitigation as well as that in aggravation in reaching its decision. A contrary interpretation, in which inquiry ceased after the finding of an aggravating circumstance, would have rendered the presentation of the case in mitigation by the defense inexplicable to the jury, as the evidence was irrelevant to either of the statutory aggravating circumstances. Our view finds further support in the trial judge's reading of the statutory jury verdict forms for each of the capital murders, which contained the phrases "having considered the evidence in mitigation of the offense" and "having considered all the evidence in aggravation and mitigation of such offense." . . . The instructions leave the definite impression that the jury was to take into account such evidence as was presented in mitigation and to exercise discretion in reaching a

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precedent. *See, e.g., LeVasseur v. Commonwealth*, 225 Va. 564, 594, 304 S.E.2d 644, 660-661 (1983), *cert. denied*, 464 U.S. 1063 (1984); *Watkins v. Commonwealth*, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986); *Gray v. Commonwealth*, 233 Va. 313, 351, 356 S.E.2d 157, 178, *cert. denied*, 484 U.S. 873 (1987); *Mackall v. Commonwealth*, 236 Va. 240, 257, 372 S.E.2d 759, 770 (1988), *cert. denied*, 492 U.S. 925 (1989); *Eaton v. Commonwealth*, 240 Va. 236, 257, 397 S.E.2d 385, 398 (1990), *cert. denied*, 502 U.S. 824 (1991); *Stockton v. Commonwealth*, 241 Va. 192, 215, 402 S.E.2d 196, 209, *cert. denied*, 502 U.S. 902 (1991); *Yeatts v. Commonwealth*, 242 Va. 121, 126, 410 S.E.2d 254, 258 (1991), *cert. denied*, 503 U.S. 946 (1992); *George v. Commonwealth*, 242 Va. 264, 283, 411 S.E.2d 12, 23 (1991), *cert. denied*, 503 U.S. 973 (1992); *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, 507 U.S. 933 (1993); *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200, *cert. denied*, 513 U.S. 889 (1994); *Mickens v. Commonwealth*, 247 Va. 395, 404, 442 S.E.2d 678, 684, *cert. granted and sentence vacated on other grounds*, 513 U.S. 922 (1994); *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 675, *cert. denied*, 513 U.S. 971 (1994); *Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865, *cert. denied*, 116 S.Ct. 204 (1995); *Roach v. Commonwealth*, 251 Va. 324, 336, 468 S.E.2d 98, 105, *cert. denied*, 117 S.Ct. 365 (1996); *Barnabei v. Commonwealth*, 252 Va. 161, 176, 477 S.E.2d 270, 279 (1996), *cert. denied*, 117 S.Ct. 1724 (1997); *Mickens v. Commonwealth*, 252 Va. 315, 320, 478 S.E.2d 302, 305 (1996), *cert. denied*, 117 S.Ct. ___ (1997).

verdict on sentencing, rather than automatically imposing the death sentence upon finding an aggravating circumstance. Petitioner's contention falls far short of satisfying the standard of *Cupp [v. Naughten*, 414 U.S. 141 (1973)] and *Henderson [v. Kibbe*, 431 U.S. 145 (1977)] for reversal on collateral review, that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Petitioner contends that the trial judge's failure to offer a fuller explanation of the concept of mitigation renders the sentences unconstitutional. We disagree. The Supreme Court has never attempted to prescribe the precise form that state jury instructions must take.

* * *

All the cases upon which petitioner relies, however, were decided prior to *Zant v. Stephens*, in which the Supreme Court ruled that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Under *Zant*, "[w]hat is important at the selection stage is an ***individualized*** determination on the basis of the character of the individual and the circumstances of the crime" (emphasis in original), and the "absence of legislative or court-imposed standards to govern the jury in weighing the significance" of the various factors is not dispositive. It is inappropriate for the federal courts on collateral review to go beyond the correction of fundamental errors implicating due process rights and attempt to prescribe the particular form which state jury instructions on mitigation must take, becoming mired in the nuances of definition and technicalities of draftsmanship. We hold that the instructions

> given here satisfied the essential requirements of due process under the Eighth and Fourteenth Amendments, in that they did not render the death sentence in any way mandatory or preclude consideration of any relevant mitigating evidence.

Briley, 750 F.2d at 1243-1245 (emphasis in original) (citations omitted).

The Fourth Circuit repeated its *Briley* holding in *Clozza v. Murray*, 913 F.2d 1092, 1103-1104, 1105 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991), and upheld it again in *Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988), despite Clanton's attempt to claim the benefit of this Court's then-recent grant of certiorari in *Franklin v. Lynaugh*. Indeed, the Fourth Circuit "consider[ed] it important to emphasize" the futility of any comparison between the Virginia and Texas systems:

> The Texas and Virginia sentencing statutes are not equivalent. Under Texas law, if the jury finds three statutory factors to be present, then the court "shall sentence the defendant to death." The significance of instructions on mitigating evidence under such a scheme has no relevance to Virginia's statute, under which jurors are always free to impose a life sentence, despite a finding of aggravating factors.

Clanton, 845 F.2d at 1242 (citations omitted).

In *Jones v. Murray*, 947 F.2d 1106, 1119 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992), the Court of Appeals again dealt with the issue. Rejecting Jones' contention that *Penry v. Lynaugh*, 492 U.S. 302 (1989), called for a different result than the court previously had reached in *Briley*, the court held as follows:

The instruction given to the jury at the sentencing phase of Jones' trial cannot be said to have left a reasonable juror with the belief that there was no vehicle for expressing the view that Jones did not deserve to be sentenced to death, based upon his mitigating evidence. See *Penry*. Taken as a whole,[11] the instructions leave no doubt that the jury was free to consider mitigating evidence and recommend life imprisonment. The trial court, for example, and to repeat, explicitly charged the jury in the ultimate paragraph of the instruction on the sentence to impose:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible or inhuman, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
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> * * *

The term "all the evidence" necessarily includes the evidence in mitigation as well as that in aggravation. Furthermore, the statutory jury verdict form used by the jury stated that it had "considered the evidence in mitigation of the offense." We believe that, as in *Briley*, the instructions given to the jury "leave the definite impression that the jury was to take into account such evidence as was presented in mitigation and to exercise discretion in reaching a verdict on sentencing, rather than automatically imposing the death sentence upon finding an aggravating circumstance." This conclusion fully accords with *Penry*'s requirement that a jury must be able "to consider and give effect to any

mitigating evidence relevant to a defendant's background and character, or the circumstances of the crime." See *Boyde v. California*. By allowing the jury to consider all relevant mitigating evidence, the procedure by which Jones was sentenced satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases. *Blystone v. Pennsylvania*; *Lockett v. Ohio*.

> [11]In reviewing jury instructions, we emphasize that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*. We further note that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than a showing required to establish plain error on direct appeal." *Henderson v. Kibbe*.

Jones, 947 F.2d at 1119-1120 (citations omitted).

Indeed, so clear to the Fourth Circuit was the claim's lack of merit under Virginia's system that in *Peterson v. Murray*, 949 F.2d 704, 705 (4th Cir.), *stay denied*, 501 U.S. 1271 (1991), it held that "Peterson's claim . . . that the trial court's penalty phase instructions did not explain the meaning and function of mitigating circumstances [is] the most evident example . . . of [a] request . . . for [a] new rule . . . upon collateral review of the case."[6]

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[6] *See also Pruett v. Thompson*, 996 F.2d 1560, 1577 (4th Cir.) (no ineffective counsel for failing to request instructions on mitigation because the instruction to consider "all the evidence" told the jury it must consider mitigating evidence), *cert. denied*, 510 U.S. 984 (1993); *Spencer v. Murray*, 18 F.3d 237, 239 (4th Cir.

In Buchanan's case, the Court of Appeals applied its established precedents to reject the petitioner's claim that the trial court had violated the Eighth Amendment by refusing his proffered instructions on specific mitigating factors:

> The Eighth Amendment requires that a capital sentencing jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*. To accomplish this purpose, a capital sentencing jury must be properly instructed. *Walton v. Arizona*, 497 U.S. 639, 653 (1990). However, the Eighth Amendment does not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances. *Zant v. Stephens*.
>
> Guided by those constitutional principles, this court has previously analyzed and rejected the argument now asserted by Buchanan. In *Clozza v. Murray*, we held that Virginia's death penalty scheme survives constitutional scrutiny, despite its "failure to instruct the jury on statutory mitigating factors." In addition, this court has reviewed and approved the constitutionality of jury instructions, used in other Virginia death penalty cases, that were essentially identical to the instructions contested in this case. *Jones v. Murray*; *Briley v. Bass*.

1994) (claim defaulted and without merit under *Jones* and *Briley*); *Bennett v. Angelone*, 92 F.3d 1336, 1350 (4th Cir.) (no ineffective counsel for failing to object to penalty instructions and verdict form or to explain mitigation to jury), *cert. denied*, 117 S.Ct. 503 (1996).

> In its verdict, the jury . . . certified that it had "considered the evidence in mitigation of the offense." In *Jones*, we concluded that "[b]y allowing the jury to consider all relevant mitigating evidence, [Virginia's sentencing] procedure . . . satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases." In light of this precedent, Buchanan's Eighth Amendment claim must fail.

(JA 204-205) (citations omitted).

The foregoing review of Virginia's sentencing procedure, the Fourth Circuit's analysis of that procedure and this Court's pronouncements on what is required under the Eighth Amendment, make clear that Buchanan is not entitled to relief. Viewed under either the "new rule" doctrine as this collateral case must be reviewed (see Argument C below), or on its merits, Buchanan's claim must fail because the Virginia Supreme Court's rejection of his claim was constitutionally reasonable, this Court never has dictated a contrary result and there is no reasonable likelihood that the petitioner's jury applied the sentencing instructions in a way that prevented it from considering the mitigation evidence Buchanan presented.

C. Buchanan's Claim Is Barred By The New Rule Doctrine.

Because Buchanan comes to this Court on collateral review instead of by way of direct appeal, his conviction and sentence may not be disturbed "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court."

O'Dell v. Netherland, 117 S.Ct. 1969, 1973 (1997); *see also Lambrix v. Singletary*, 117 S.Ct. 1517, 1525 (1997) ("our first and principal task is . . . to determine . . . whether . . . the unlawfulness of Lambrix's conviction was apparent to all reasonable jurists"); *Gray v. Netherland*, 116 S.Ct. 2074, 2083 (1996) ("habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' ") (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)); *Teague v. Lane*, 489 U.S. 288 (1989).[7]

It is settled that the *Teague* inquiry is conducted in three steps: (1) the date on which the petitioner's case became final is determined; (2) the "legal landscape" at that time is surveyed to determine whether the state court would have felt compelled to conclude the petitioner's claim was required by the Constitution; and (3) if not compelled, the rule is "new" and the Court must determine whether it meets one of two exceptions to the *Teague* doctrine. *See O'Dell*, 117 S.Ct. at 1973.

Buchanan's conviction and sentence became final on January 22, 1990, when this Court denied his petition for a writ of certiorari on direct appeal. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). In order for Buchanan to prevail, he must establish that the Eighth Amendment required in 1990 that his jury be instructed that certain evidence is a

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[7] The respondent raised the "new rule" defense in the Fourth Circuit (Resp. Br. at 10-11) and in his brief in opposition to Buchanan's petition for a writ of certiorari. (Resp. Br. in Opp. at 8-9). The Fourth Circuit did not address the new rule implications of Buchanan's claim.

"fact which mitigates against imposing the death penalty." (JA 74-76). He also must establish that the Virginia Supreme Court's ruling that the requested instructions were not required because they risked limiting the jury's freedom to consider anything as mitigation, was a ruling that no reasonable jurist could have made. *See Graham v. Collins*, 506 U.S. 461, 477 (1993).

Buchanan has not even attempted to meet these threshold requirements of the new rule doctrine, but rather has made an argument more suitably directed to the state legislature: other States have chosen to list mitigating factors in jury instructions, so Virginia should do so too. *See, e.g.*, Pet. Br. at 26 (Virginia's decision "rests on no legislative determination of necessity (***or*** propriety), nor would any discernible legislative policy be adversely affected if it were stopped") (emphasis in original); Pet. App. 1-45 (listing the jury instructions given in other States).[8]

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[8] Apart from the fact that what other States – most of which employ "weighing" systems in which a list of mitigating factors makes sense – have chosen to do says nothing about the constitutionality of Virginia's instructions in a non-weighing system, Buchanan appears to have set forth in his appendix the statutes and instructions in effect ***today*** in those States. The reasonableness of the Virginia Supreme Court's ruling, however, depends only on what the state of the law was in January, 1990. *See, e.g., Gregg*, 428 U.S. at 222 (White, J., concurring) ("The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of ***factors too intangible to write into a statute***") (emphasis added); *Zant v. Stephens*, 456 U.S. 410, 411 n.1 (1982) (Georgia sentencing instruction directed jury to consider any mitigating or aggravating circumstances but specified only aggravating factors).

In addition to his irrelevant legislative argument,[9] *see Tuilaepa*, 512 U.S. at 978 ("Our decisions in *Zant* and *Gregg* reveal that, at the selection stage, the States are not confined to submitting to the jury specific propositional questions"), Buchanan's contention rests primarily upon a confusion between what is constitutionally required for the "eligibility stage" and what is required for the "selection stage." Indeed, after stating correctly that his case deals only with the "selection" phase of trial (Pet. Br. at 17), Buchanan erroneously recites the holdings of this Court's "eligibility" cases as support for his claim. *See* Pet. Br. at 18-19 (relying on *Godfrey v. Georgia*, 446 U.S. 420 (1980) and *Stringer v. Black*, 503 U.S. 222 (1992)).

As previously shown, the channeling required for the "eligibility" phase of a capital sentencing proceeding is simply not transferable to the "selection" phase. The "separate requirement," *see Tuilaepa*, 512 U.S. at 972, for the "selection phase" is "satisfied by allowing the jury to consider all relevant mitigating evidence," *id.* at 972-973, and "it must be recognized that the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion." *Id.* at 974.

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[9] Petitioner's amicus also makes an argument that, because so many other States now require specification of mitigating factors, then the Eighth Amendment's "evolving standards of decency" requires Virginia to do the same. (Amicus Br. at 10). In addition to the fact that this Court's rulings giving States freedom in the area of developing proper sentencing systems contravenes amicus' theory, this Court has not extended the comparative "decency" standard into the arena of what particular sentencing instruction must be given to a jury in a state capital trial. This Court certainly should not decide to employ that standard for the first time in a collateral case.

In short, Buchanan's attempt to engraft upon the "selection phase" the requirements of narrowing and fact-specificity applicable to the "eligibility phase," is a bridge this Court already crossed in *Tuilaepa*, and one it may not recross in this collateral case.

Buchanan wanted his jury directed and limited by focusing on specific factors and then directed, not simply to consider those facts in the open-ended way California has chosen and which this Court has approved in *Tuilaepa*, but to conclude that the circumstances he specified such as his age, no criminal record, his capacity to appreciate the criminality of his conduct, etc., were facts which actually mitigated imposition of the death sentence. (JA 74-76).[10] Certainly no precedent binding on the Virginia Supreme Court ever has "compelled" or "dictated" such limitation on the "selection phase." Indeed, the petitioner's claim is so clearly not "compelled" that Buchanan did not even believe it important enough to include in his certiorari petition on direct appeal in 1990, although he was on notice then that the new rule doctrine would bar its consideration later.

Just as in *Saffle*, the petitioner is asking for the creation of "a rule relating, not to ***what*** mitigating evidence the jury must be permitted to consider in making its sentencing determination, but ***how*** it must consider the

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[10] Certainly one of the impermissible results of the requested instructions would have been a limitation on the jury's freedom to consider Dr. Brown's testimony concerning Buchanan's high score on the "psychopathic deviancy scale" (Tr. 1390-1391, 1418-1419), as an aggravating factor. *See Tuilaepa*, 512 U.S. at 983 (Stevens, J., concurring) (both defendant and prosecutor have the right to adduce favorable or unfavorable evidence on sentencing factors).

mitigating evidence." 494 U.S. at 490 (emphasis in original). Just as in *Saffle*, the petitioner does not contend that the State "altogether prevented" the jury from considering his evidence, but rather that the State "has unconstitutionally limited the manner in which his mitigating evidence may be considered." *Id.* at 491. Clearly, Buchanan's claim constitutes an impermissible new rule, just as Saffle's did. *See also Henderson v. Kibbe*, 431 U.S. at 155 (petitioner's burden of demonstrating that an erroneous instruction is so prejudicial as to support a collateral attack on a state criminal judgment is even greater than the showing required to establish plain error on direct appeal).

Indeed, contrary to Buchanan's characterization of the Virginia Supreme Court's ruling as "mysterious" (Pet. Br. at 26), Virginia provides one of the most logical and defendant-friendly systems of capital sentencing in the Nation. Unlike, for example, the Texas system in which the death sentence is imposed automatically upon an affirmative answer to what traditionally are considered as questions regarding aggravating factors, in Virginia the jury is instructed, as is the case in Georgia, that even if it finds beyond a reasonable doubt an aggravating factor, it need not impose a death sentence but, instead, may impose a life sentence if it believes from all the evidence that the death penalty is not justified. (JA 73).[11]

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[11] Virginia's sentencing system thus provides more protection for the defendant than the Constitution requires. *See Johnson*, 509 U.S. at 371 ("we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant"); *Boyde*, 494 U.S. at 377 (rejecting suggestion that jury must have freedom to decline to impose death penalty even if jury finds aggravating factors outweigh mitigating factors).

The Virginia Supreme Court's decision that a specification of particular mitigating factors could mislead the jury into concluding that it is limited to only those specified factors, undoubtedly benefits the defendant and is a conclusion that, in 1990, or now, was constitutionally reasonable. *See McGautha*, 402 U.S. at 208 ("For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete"). Moreover, the Virginia Supreme Court's ruling would seem to be the best, and certainly the most prudent, response to this Court's admonition that,

> States cannot limit the sentencer's consideration of any relevant circumstances that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey, 481 U.S. at 306. In this respect, what the Court held in 1899, in reversing a murder conviction because the trial court had directed the jury that it could not recommend mercy unless it found a mitigating circumstance, is as true today as it was then:

> How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

Winston v. United States, 172 U.S. 303, 313 (1899), *quoted in McGautha*, 402 U.S. at 200.[12] Without question, in order to grant Buchanan the relief he requests, this Court necessarily would have to overrule a host of precedent, including *McCleskey*, *Zant* and *Tuilaepa*. *See Tuilaepa*, 512 U.S. at 978 (petitioner's claim "contravenes our precedents").

At trial, Buchanan expressly agreed that Virginia's pattern instruction should be given, a concession that was understandable given the fact that the instruction meets the Eighth Amendment's requirement for the "selection phase" by instructing the jury that "if you believe from all the evidence" that death is not justified, then a life sentence "shall" be given. (JA 73). Again, as the Fourth Circuit has articulated, "***All the evidence*** . . . necessarily means that the jury was to consider the evidence

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[12] Buchanan's assertion that his refused instruction "AB" directing the jury to consider "any other facts in mitigation" (JA 74) somehow undercuts the Virginia Supreme Court's decision that the jury could be misled by specifying certain factors, does not in any way diminish the common sense principle that a jury may give special, if not exclusive, consideration to factors which are specially highlighted by a court's instruction. *See Tuilaepa*, 512 U.S. at 983-984 (Stevens, J., concurring) ("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible"); *Mackall v. Commonwealth*, 236 Va. at 258, 372 S.E.2d at 770 (singling out certain mitigating factors for special emphasis could limit impermissibly the jury's consideration of other factors not so specified). Moreover, the very factors Buchanan wanted specified for his jury, *i.e.* "extreme mental or emotional disturbance," may have led the jury to believe it could not dispense mercy if it believed he was acting under a less than extreme mental disturbance when he murdered his family. The Virginia Supreme Court's rule thus additionally safeguards against such a restriction on the jury's freedom to decide the appropriate sentence.

presented in mitigation as well as that in aggravation . . . . " *Briley*, 750 F.2d at 1243.

The Virginia Supreme Court's decision not to characterize particular evidence as mitigating, but rather to instruct the jury to consider all the evidence and to have the jury certify that it in fact considered all the mitigating evidence, was constitutionally reasonable.[13] It cannot be said that "all reasonable jurists would have deemed themselves compelled" to accept Buchanan's claim now, much less in 1990. *See Graham*, 506 U.S. at 477; *Peterson*, 949 F.2d at 705 (identical claim is "most evident example" of new rule). This Court should deny relief because to do otherwise would create an impermissible new rule of constitutional law.[14]

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[13] In the context of the new rule's "legal landscape" inquiry, *see Caspari*, 510 U.S. at 390, this Court's repeated denials of certiorari petitions in which Virginia capital defendants expressly complained about the constitutionality of the denial of specific mitigation instructions – including Buchanan's second petition for certiorari filed after his state habeas proceeding – certainly could have been considered by a reasonable state court as some measure of assurance that its rulings were not unconstitutional. (See cases listed above, notes 5 and 6 and pages 30-36); *see also Gilmore v. Taylor*, 508 U.S. 333, 344 n.3 (1993) ("The existence of . . . an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedent by state courts").

[14] Just as in *Graham*, the rule Buchanan seeks – to channel the jury's discretion at the "selection phase" – meets neither of the *Teague* exceptions. It would not decriminalize a class of conduct or prohibit the imposition of capital punishment on a particular class and it is not the type of "watershed rule of criminal procedure" that is considered "implicit in the concept of ordered liberty." 506 U.S. at 477-478.

D. There Is No Reasonable Likelihood That The Jury Was Prevented From Considering Buchanan's Mitigating Evidence.

Even assuming that Buchanan could overcome the new rule obstacles facing review of his claim, he still would not be entitled to relief. First, as shown above, the Virginia Supreme Court's decision, and the Fourth Circuit's affirmance of that decision, demonstrate that the refusal of Buchanan's instructions on mitigation did not violate the Eighth Amendment's requirement that the jury be allowed to consider mitigating evidence.

Second, in *Boyde*, the Court held that "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," but that "a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility" that the jury was prevented from considering mitigation. *Boyde*, 494 U.S. at 380; *see also Henderson*, 431 U.S. at 155 (petitioner's burden "especially heavy" where no erroneous instruction given: "an omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law"). The record in Buchanan's case, however, demonstrates that not even a possibility of such error exists.

From the very beginning of the sentencing phase, the prosecutor properly told Buchanan's jury that its job was to balance the defendant's evidence, referred to by the prosecutor as "these things that are in his favor," against "these horrible things that he has done." (JA 27). Also from the beginning of the sentencing phase, Buchanan told the jury that he would be presenting "mitigation."

(JA 29). Then, for two days, the jury listened to an extensive array of expert, and other, evidence regarding Buchanan's background, childhood and psychological status at the time he murdered his four family members. Each of the three experts who testified told the jury that he had been appointed by the court to examine the defendant for possible mitigating factors. (Tr. 1371, 1484, 1532).[15] Each expert analyzed the case with regard to Virginia's statutory mitigating factors: whether the defendant was under the influence of extreme mental or emotional disturbance and whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. *See* Va. Code § 19.2-264.4(B). Just as in *Boyde* and *Brown*, it was "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.' " *Boyde*, 494 U.S. at 383, *quoting Brown*, 479 U.S. at 542. *See also Boyde*, 494 U.S. at 384 ("the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous").

Perhaps the most significant evidence in the record that demonstrates what Buchanan's jury surely believed its duty to be comes from the closing arguments of both the prosecutor and defense attorney. ***Both*** attorneys told the jury repeatedly that it was the jury's duty to consider Buchanan's mitigating evidence and that the jury could give a life sentence even if the aggravating factor of

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[15] The jury surely believed that the testimony of the experts, commissioned as it was by the judge, was evidence which it was duty-bound to consider.

vileness had been proven.[16] (JA 43-44, 59-61, 64-66, 68). In fact, the prosecutor expressly conceded that Buchanan had proven mitigating factors. (JA 68: "If the only question was is there mitigation, we could have stopped back on Thursday night. Even Dr. Lee and Dr. Gwaltney say yes, there is some mitigating circumstances").

Buchanan attempts to minimize the impact of these arguments by reference to this Court's statement in *Boyde* that the "arguments of counsel generally carry less weight with a jury than do instructions." 494 U.S. at 384 (Pet. Br. at 30). That statement certainly has force in a case like *Boyde* where it was claimed that the prosecutor's argument had reinforced an impermissible interpretation of an instruction, *see also Penry*, 492 U.S. at 329 (prosecutor's argument led jury to believe it could not consider Penry's mitigation), but is misplaced in the context of a case like Buchanan's, where both the prosecutor and defense attorney argued in agreement and in detail regarding the very information Buchanan wanted included in the court's instructions. *See Brown*, 479 U.S. at 546 (O'Connor, J., concurring) ("On remand, the California Supreme Court should determine whether the jury instructions, taken as a whole, and ***considered in combination with the prosecutor's closing argument***, adequately informed the jury of its responsibility. . . . ") (emphasis added).

Moreover, although Buchanan disingenuously argues that the Fourth Circuit "sought solace in the paltry fact"

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[16] The vileness of Buchanan's acts, defined as "torture, depravity of mind or aggravated battery" (JA 73) never was in dispute. Buchanan's multiple shootings and vicious slashings of the victims, two of whom were under the age of 14, did not present even a close case on that issue.

that the verdict form, signed "only by the foreperson" (Pet. Br. at 27-28), certified that the jury had ***considered the evidence in mitigation of the offense,*** the Fourth Circuit properly relied on the verdict's "mitigation" language as an additional reason supporting the conclusion that Buchanan's jury considered the mitigating evidence. *See Buchanan* (JA 204-205); *Jones*, 947 F.2d at 1119-1120; *Briley*, 750 F.2d at 1243-1245. Buchanan relegates the verdict form to an after-the-fact boilerplate technicality, but the record shows otherwise. Before deliberations, the trial judge instructed the jury according to the pattern instruction and then further instructed that the two written verdict forms be taken to the jury room along with the other instructions and evidence. (JA 72). Then, upon the clerk's reading of the death verdict in open court, including the language that the jury had "considered the evidence in mitigation," the judge ***twice*** asked the jurors if that was the verdict of "each and every one of you." (Tr. 1662). Each juror, individually polled, answered that it was. (Tr. 1662-1664). Thus, as the Fourth Circuit properly recognized, the certified verdict form is clear evidence that the jury in fact considered Buchanan's mitigating evidence.

In sum, there was no dispute in this case that Buchanan had shown mitigating evidence, there was no dispute that the jury was required to consider it and there was no dispute that the jury could refuse to give a death sentence even if the aggravating factor had been proven. (JA 71: prosecutor told jury "[i]f you believe the crime was vile, I am not going to sit here and suggest to you that you must bring back a sentence of death. That is not the law."). It simply is impossible to conclude that there is

a reasonable likelihood that Buchanan's jury, after hearing the volumes of mitigating evidence in the case and, after hearing both the prosecution and defense agree on their explanation of the jury's duty to consider each mitigating factor, then took the court's instructions and verdict forms which directed it to consider all the evidence and to certify that it had considered the evidence in mitigation, and nevertheless applied those instructions in such a way that ***prevented*** it from considering the mitigating evidence.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DOUGLAS MCARTHUR BUCHANAN, JR.,
Petitioner,

vs.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. In the final selection step of a capital sentencing proceeding, does a jury instruction which directs the jurors to consider all the evidence and return a life sentence if the death penalty is not justified violate the Eighth Amendment?

2. Would an affirmative answer to Question 1 be a "new rule," which cannot be created on habeas corpus?

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DOUGLAS MCARTHUR BUCHANAN, JR.,
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RONALD J. ANGELONE, Director,
Virginia Department of Corrections, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no question of whether petitioner is actually guilty. Such

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

The facts of the case are set forth in the opinion of the Supreme Court of Virginia. *Buchanan* v. *Commonwealth*, 384 S. E. 2d 757, 760-761 (Va. 1989), J. A. 79-84. Additional facts are stated in the briefs of the parties and the opinion of the federal district court. J. A. 88-92. We summarize them here as necessary to frame the issues discussed in this brief.

Defendant Douglas Buchanan, Jr. was 19 years old at the time of the crime. Brief for Petitioner 5. He was married and lived with his wife separately from his father and stepmother. J. A. 89. Buchanan's mother had died when he was nine, and his father had remarried soon thereafter. Brief for Petitioner 6. The stepparent relationship was a poor one, and defendant demonizes the stepmother. *Id.*, at 6-7. Geraldine Buchanan is not able to tell her side of this story. Defendant has rendered her unavailable as a witness.

"On September 14, 1987, Buchanan and [his wife] talked about killing his parents. The two of them even drove to the Buchanan home that evening, but Buchanan decided not to kill anyone that night and they left." J. A. 89 (footnote omitted).

The next day, he had apparently reconsidered. He went to his father's house carrying a rifle and wearing rubber gloves. J. A. 79. After arguing with his father, Buchanan shot him in the back of the head as he was walking away. J. A. 80. He then shot him point blank between the eyes. *Ibid.*

When Buchanan's brothers, age 10 and 13, arrived home from school a few minutes later, he killed them both. J. A. 80. When Mrs. Buchanan arrived home, he killed her as well. J. A. 80-81. All four victims suffered multiple gunshots, stabbings, or both. *Ibid.* The evidence of planning was so clear that Buchanan was not entitled to second-degree murder instructions. *Id.*, at 83. At the penalty phase, a defense psychiatrist

testified regarding the psychological effects of Buchanan's childhood difficulties. Brief for Petitioner 8-9. Defense counsel argued for a mitigating circumstance of "extreme mental or emotional disturbance" based on this testimony. J. A. 61-66.

The jury returned the following verdict:

> "We, the Jury, on the issue joined, have found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death." J. A. 77.

The Supreme Court of Virginia affirmed. *Buchanan* v. *Commonwealth*, 384 S. E. 2d, at 760. This Court denied certiorari on January 22, 1990, *Buchanan* v. *Virginia*, 493 U. S. 1063, making the decision "final" for retroactivity purposes.

The state trial court denied habeas relief, after an evidentiary hearing on ineffective assistance, in December, 1991. The Virginia Supreme Court denied appeal in June, 1992. This Court denied certiorari. *Buchanan* v. *Murray*, 506 U. S. 988 (1992).

Defendant filed a federal habeas petition, making 36 claims. J. A. 94-100. After an exhaustive opinion, see J. A. 100-199, the district court found that all of them were either defaulted or meritless. J. A. 199. The Fourth Circuit affirmed. *Buchanan* v. *Angelone*, 103 F. 3d 344, 351 (1996). The panel denied rehearing and no member of that court requested a poll on rehearing *en banc*. J. A. 215.

On April 28, 1997, this Court granted certiorari limited to Question 1 of the petition, J. A. 216, regarding the Eighth Amendment challenge to the penalty phase jury instructions. See Pet. for Cert. i. Question 2 was a due process challenge to the instructions based on a state statute. *Ibid.*

SUMMARY OF ARGUMENT

Defendant's attack on Virginia's jury instructions fails to distinguish between the two very different decisions in capital sentencing: the eligibility decision and the selection decision. Attacking the lack of structure in the selection decision, he ignores the substantial guidance and structure in Virginia's eligibility determination, which not only meets but exceeds constitutional requirements.

Once attention is properly focused on this Court's precedents regarding the selection decision, we see that structuring of that decision is permitted but not required. There is no requirement to list mitigating circumstances, and the instruction to consider all the evidence and decide if the death sentence is justified fully complies with the applicable precedents.

The Virginia statute containing a nonexclusive list of "facts in mitigation" raises no federal issue within the scope of the question on which certiorari was granted. The Virginia Supreme Court has reasonably interpreted that statute to not require reading the list to the jury, and its interpretation is binding on federal courts. This Court denied certiorari of the *Hicks* v. *Oklahoma* argument, and it is not properly before the Court.

Defendant's argument that juries cannot be trusted to recognize what facts call for a sentence less than death in a particular case is contrary to the premise on which the *Lockett* line of cases is based. Either that line was wrongly decided and should be overruled, or defendant's argument must be rejected.

ARGUMENT

Although defendant places his arguments under a single heading, see Brief for Petitioner 16, there appear to be three discernable contentions in his argument. First, he argues that the Virginia instruction provides the jury too much latitude, *i.e.*, "tells jurors that they may do anything they please for any reason or no reason . . . ." *Id.*, at 20. Second, he argues that "the instructions do not give the jury an appropriate 'vehicle' to consider the mitigation presented . . . ." *Id.*, at 23. Finally, defendant complains that the Virginia courts have not implemented what he perceives to be the mandate of the Virginia Legislature, which has listed a set of mitigating factors in the sentencing procedure statute. See *id.*, at 26. For brevity, these contentions could be called the *Furman* claim, see *Furman* v. *Georgia*, 408 U. S. 238 (1972), the *Penry* claim, see *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), and the statutory claim. See Va. Code Ann. § 19.2-264.4B. All are without merit.

I. Structuring of the final selection stage in capital sentencing is permitted but not required.

The basic flaw in defendant's *Furman* argument is his failure to adequately distinguish the separate parts of the capital sentencing process. In the jurisprudence developed since *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases, the stages of the process have very different requirements, and an argument that does not distinguish between them misses an essential point.

The two phases are "the eligibility decision and the selection decision." *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994). Their different requirements are most succinctly stated in *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988). "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more."

The first stage of the process is the definition of the death-eligible class, and in this stage the Constitution *requires* that the sentencer's discretion be limited. In the second stage, the determination of whether a death-eligible defendant will actually be sentenced to death, the Constitution *forbids* excessive limitations on the sentencer's discretion. See *McCleskey* v. *Kemp*, 481 U. S. 279, 303-304 (1987); *Graham* v. *Collins*, 506 U. S. 461, 468 (1993) (Souter, J., dissenting).

Other summaries of the Eighth Amendment requirements break out subparts of the two-stage structure. *Tuilaepa*, 512 U. S., at 971-972, notes several requirements for the eligibility decision. The death penalty must be a proportionate punishment for the crime according to federal constitutional standards. Also, the circumstances for eligibility set by state law must narrow the eligible class, and they must not be unconstitutionally vague.

Justice Stevens set forth a similar analysis in his dissent in *Graham*, 506 U. S., at 501-502, in which he identified "four important safeguards against arbitrary imposition of the death penalty." First, there is the proportionality requirement of *Enmund* v. *Florida*, 458 U. S. 782 (1982) and *Coker* v. *Georgia*, 433 U. S. 584 (1977). *Graham*, 506 U. S., at 501. Second, there is the requirement of a narrowing of the eligible class to something less than all murderers through statutory criteria. *Ibid.* Third, there is the requirement that these narrowing criteria not be so vague that they "fail to cabin sentencer discretion in the determination of death-eligibility . . . ." *Id.*, at 502-503. "Finally, at the end of the process, when dealing with the narrow class of offenders deemed death-eligible, we insist that the sentencer be permitted to give effect to all relevant mitigating evidence offered by the defendant, in making the final sentencing determination." *Id.*, at 503.

Which of these four safeguards does the Virginia system violate? None. It observes them all.

First, the various offenses which constitute capital murder in Virginia all require a "willful, deliberate, and premeditated killing." Va. Code Ann. § 18.2-31(1)-(11). There is no *Coker* or *Enmund* problem.

For the second requirement, Virginia not only narrows, it narrows twice. States may constitutionally narrow the eligible class either by defining a new crime of capital murder, as Texas does, or by requiring the finding of an "aggravating circumstance," as Georgia does. See *Lowenfield*, 484 U. S., at 244-246. Virginia, like Louisiana, does both. See *id.*, at 246; Va. Code Ann. § 18.2-31 (capital murder defined); *id.*, § 19.2-264.2 (additional aggravating criteria required).

The third hurdle is also easily cleared here. Defendant Buchanan killed four people instead of one. See Va. Code Ann. § 18.2-31(7). A clearer and more objective criterion for narrowing the eligible class is difficult to imagine.

In addition, this jury found true the circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman *in that it involved torture, depravity of mind or an aggravated battery to the victim* . . . ." Va. Code Ann. § 19.2-264.2(1) (emphasis added). This Court held over 20 years ago that the italicized portion of this circumstance makes it sufficiently objective to pass constitutional muster. See *Proffitt* v. *Florida*, 428 U. S. 242, 255-256 (1976) (lead opinion) (narrowing construction of "especially heinous"); see also *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988) (no real difference between "especially heinous" and "outrageously vile" instructions); *Godfrey* v. *Georgia*, 446 U. S. 420, 431-432 (1980) (plurality opinion) (same language would have appropriately limited "outrageously vile" if properly applied).

The eligibility determination in this case is thus unimpeachable, easily passing the three requirements. That leaves only the final selection decision as an issue. Defendant recognizes this early in his brief, Brief for Petitioner 17, and then proceeds to disregard the distinction later. He attacks Virginia's selection instruction with out-of-context quotes from cases discussing eligibility criteria. He quotes *Gregg* v. *Georgia*, 428 U. S. 153, 197 (1976) (lead opinion) for the proposition that the Georgia

system was constitutional because "the jury's attention is directed to the specific circumstances of the crime . . . ." Brief for Petitioner 20. But the circumstances listed immediately after that phrase in *Gregg* are *eligibility* circumstances. Once the eligibility "plane" has been crossed, those circumstances do "not play any role in guiding the sentencing body in the exercise of its discretion . . . ." *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983).

The *amicus* supporting petitioner is similarly confused. After discussing the eligibility-criteria cases of *Godfrey* and *Maynard*, *amicus* asks, "If words such as 'heinous' provide insufficient guidance, then an instruction with no words and no content cannot possibly be enough." Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 4. This argument ignores the objective facts of the eligibility determination in this case, the same determination that was at issue in *Godfrey* and *Maynard*. "The willful, deliberate, and premeditated killing of more than one person . . . ." Va. Code Ann. § 18.2-31(7), does indeed provide more guidance than "heinous."

If the argument is that the state *must* provide a list of mitigating circumstances, in addition to a catch-all, that argument cannot survive this Court's repeated approval of the Georgia system. Georgia has no statutory list of mitigating circumstances. The Georgia statute lists the aggravating circumstances, one of which must be found for eligibility, and then directs the sentencer to consider any mitigating evidence. *Gregg*, 428 U. S., at 164, 197;[2] see also *Zant* v. *Stephens*, 456 U. S. 410, 411-412, n. 1 (1982) (*per curiam*) (text of instruction, no mitigating circumstances listed); Brief for Respondents, Argument B, note 3 and accompanying text (similarity of Virginia and Georgia systems). Gregg made the same attack Buchanan makes. The wide-open nature of mitigation in Georgia, he said, brought back the evils condemned in *Furman*.

2. This statute is now Ga. Code Ann. § 17-10-31.

428 U. S., at 203. This Court rejected the argument. *Id.*, at 203-204.

Cases since *Gregg* which have sustained attacks on the final selection phase of capital sentencing have all involved limitations on the sentencer's discretion, limitations on evidence, or injection of a prejudicial factor. Defendant has cited no case, and *amicus* CJLF is aware of none, in which this Court has overturned a sentence of a defendant properly convicted and properly found death-eligible on the ground that the sentencer was given *too much* discretion.

The first rule of the selection stage is that the death sentence cannot be mandatory. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (lead opinion). The sentencer must have *some* discretion.

Then the rule was established that the sentencer must not be precluded, by law or instructions, from considering any factor defendant proffers as mitigating. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982). This discretion extends to each juror, even if the others find the proffered factor to be false. *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988). Basing a sentence on answers to specific questions is invalid if the questions do not provide a "vehicle" to consider a particular mitigating circumstance, *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), a requirement discussed in part II, *post*. A corollary rule to *Lockett* is that evidence may not be excluded on the ground it is irrelevant if it is, in fact, relevant to a factor defendant is entitled to proffer under *Lockett*. *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986).

Finally, the state may not inject prejudicial factors into the selection decision. Thus, membership in a racist prison gang may not be introduced if not relevant to a factor under consideration, because to do so would impair the First Amendment right of association. *Dawson* v. *Delaware*, 503 U. S. 159, 168 (1992). In addition, the jury may not be instructed in the final phase with "propositional" factors, *i.e.*, questions with a yes-or-

no answer, if those factors are excessively vague. *Tuilaepa* v. *California*, 512 U. S., at 974-975.[3]

None of these rules, and none of the concerns underlying these rules, is implicated by an instruction to consider all the evidence without enumerating specific mitigating factors. The jury in this case was not told it *must* sentence the defendant to death, as in *Woodson*. It was not told to focus exclusively on some mitigating factors to the exclusion of others, as in *Lockett*. It was not required to answer questions on which the mitigating evidence cannot help the defendant, as in *Penry*. It was not distracted with prejudicial factors, as in *Dawson*, or invalid aggravators as in *Stringer* v. *Black*, 503 U. S. 222, 232 (1992).

While reviewing the systems of other states, this Court has noted many times that states *may* provide the jury with additional guidance and identify the factors that society as a whole deems particularly relevant. See, *e.g.*, *California* v. *Ramos*, 463 U. S. 992, 999-1000 (1983); *Tuilaepa*, 512 U. S., at 984 (Stevens, J., concurring in the judgment). The fact that such additional guidance is permitted or desirable does not mean that it is required by the Constitution. Cf. *Harris* v. *Alabama*, 513 U. S. 504, 511 (1995) ("approbation" of standard used in Florida for jury override does not mean it is constitutionally required).

Defendant argues that Virginia's final selection step is "an unregulated, arbitrary, free-for-all." Brief for Petitioner 16. In other words, he complains that "the sentencer [is] given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for the death penalty.' " *Tuilaepa*, 512 U. S., at 979-980 (quoting *Zant*, 462 U. S., at 875). This Court has repeatedly held such discretion to be valid. *Ibid.*

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3. Defendant cites *Tuilaepa*, at 973, for the proposition, "If the *explanation of mitigation* is 'too vague' . . . then the Eighth Amendment is violated." Brief for Petitioner 23 (emphasis added). *Tuilaepa* does not say that. The cited passage discusses vague factors, not explanation of the concept of mitigation.

II. Virginia's "justified" instruction correctly conveys the essence of *Lockett*.

At the penalty phase in the present case, the jury was instructed, "Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt" the truth of the statutory aggravating circumstance alleged by the prosecution. J. A. 73. The instruction went on,

> "If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you *may* fix the punishment of the Defendant at death or if you believe *from all the evidence* that the death penalty is not *justified*, then you *shall* fix the punishment of the Defendant at life imprisonment." *Ibid.* (emphasis added).

The question is whether this instruction meets the individualized sentencing requirement of *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) and its progeny, including *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and *Penry* v. *Lynaugh*, 492 U. S 302 (1989). For the reasons that follow, *amicus* submits that this language not only meets the constitutional minimum, it conveys the essence of *Lockett* at least as well as other instructions approved by this Court. It does so better than the pre-1991 Texas instructions, which were upheld as applied in most cases.

It would be entirely proper to look to the verdict form, the arguments, and the evidence to bolster this conclusion. See *Buchanan* v. *Angelone*, 103 F. 3d 344, 348 (CA4 1996), J. A. 205; *Boyde* v. *California*, 494 U. S. 370, 384 (1990); Brief for Respondents, Argument D. This shoring up is not necessary, however. The instruction is correct on its face.

Defendant attacks the instruction as "scant," see Brief for Petitioner 16, as if brevity were a vice. It is not. Brevity is often a virtue in jury instructions. Elaborations meant to clarify an issue can end up confusing it.

Victor v. *Nebraska*, 511 U. S. 1 (1994) illustrates the point. The Constitution requires that juries find guilt "beyond a reasonable doubt." *Id.*, at 5. Naturally, the jury must be told of the standard. Beyond the "scant" words of the standard itself, to use defendant's term, "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Ibid.* Indeed, two circuits have held they should not, *id.*, at 25, n. * (Ginsburg, J., concurring in part), although opinion on that point is divided. See *id.*, at 26 ("the argument for defining the concept is strong"). The problem in *Victor* arose because Nebraska went considerably beyond a basic definition. See *id.*, at 18. Although ultimately upheld, this excessively elaborate definition was "somewhat problematic." *Id.*, at 19.

An instruction which is brief, or even "sparse," may convey the correct meaning better than one that goes on for pages. To see if Virginia's instruction conveys a meaning consistent with the *Lockett* line of cases, we must return to first principles.

The problem of sentencing discretion in capital cases was first addressed in depth in *McGautha* v. *California*, 402 U. S. 183 (1971). McGautha's jury, like Buchanan's, was told to consider the evidence presented. *Id.*, at 189. From that point, though, the jury was told " 'the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury.' " *Id.*, at 190.

Justice Harlan, writing for the majority, reviewed the history of capital punishment and discretionary sentencing. *Id.*, at 196-203. He noted the difficulty of structuring the sentencing decision. *Id.*, at 204. He reviewed both the Royal Commission recommendation for "unfettered discretion" and the Model Penal Code proposal for lists of aggravating and mitigating circumstances to be weighed against each other. *Id.*, at 205-206. The opinion then concluded that the latter approach is not constitutionally required.

"It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected. Thus, they indeed caution against this Court's undertaking to establish such standards itself, *or to pronounce at large that standards in this realm are constitutionally required.*

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been *suggested by the evidence or by the arguments of defense counsel*. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for *no list of circumstances would ever be really complete*. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need." *Id.*, at 207-208 (emphasis added, footnotes omitted).

To the extent that it upheld an absence of standards in the capital sentencing decision as a whole, *McGautha* was effec-

tively overruled by *Furman* v. *Georgia*, 408 U. S. 238 (1972). In the cases since *Furman*, though, we see that *McGautha* survives in a limited form. The eligibility decision addresses the concerns of *Furman*. See *Zant* v. *Stephens*, 462 U. S. 862, 877, n. 15 (1983). In the selection decision, *McGautha* is still good law.

The post-*Furman* revival of *McGautha* begins in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). The lead opinion gave three reasons for rejecting mandatory sentencing in capital cases. First, there was the long history of legislative rejection of mandatory sentencing. *Id.*, at 292-301. This was the same history relied on by *McGautha* for its approval of wide-open sentencing discretion, and *Woodson* relies on *McGautha* itself and the *Furman* dissent for this point. *Id.*, at 297.

Second, and most compellingly, *Woodson* observed that a mandatory death penalty for all first-degree murder would never be fully enforced. The powerful call for mercy in some cases would lead some juries to nullify, thus making the sentence depend on the willingness of jurors to disobey their instructions. *Id.*, at 302-303. This factor has nothing to do with the relative culpability of the defendant and invites discriminatory application. See Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 109 (1987). Finally, the *Woodson* lead opinion held that there was a constitutional imperative to consider not only the circumstances of the crime but also "the character and record of the individual offender . . . ." 428 U. S., at 304. This requirement was thought to flow from a need to treat the convicted persons as "uniquely individual human beings," rather than "members of a faceless, undifferentiated mass . . . ." *Ibid.*

Virginia's instruction violates none of the components of *Woodson*. By no stretch of the imagination could this be characterized as a mandatory death penalty. The instruction uses the permissive "may." There is no concern about jury nullification here, since the jury is expressly directed to return a life verdict whenever they feel the death penalty is not

justified. Finally, the wide-open admissibility of mitigating evidence combined with the express direction to consider it makes this an individualized procedure.

Renewed confidence in the ability of juries to exercise sentencing discretion continued in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The plurality quoted *McGautha* with apparent approval for the proposition "that 'jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.' " *Id.*, at 598.

After noting the abrupt change in *Furman*, *ibid.*, the retrenchment in *Gregg* and *Woodson*, *id.*, at 600-601, and the long history of discretionary sentencing, *id.*, at 602-603, *Lockett* announced its rule in the double negative form it has retained ever since. "[T]he sentencer . . . [must] *not* be *precluded* from considering, as a mitigating factor, any aspect of a defendant's character or record . . . ." *Id.*, at 604 (emphasis added and deleted). The "not precluded" construction of this sentence implies confidence that the jury will know what to consider as mitigating and how much weight to give it if only the state does not place barriers in its way.

True to this statement of the principle, all of the cases in the *Woodson-Lockett* line which overturn the sentence involve some kind of barrier between the sentencer and the decision that might have been reached on unfettered, unguided common sense. In *Eddings* v. *Oklahoma*, 455 U. S. 104, 109 (1982), the trial judge believed he was precluded by law from considering part of the mitigating evidence. For the context of judge sentencing, *Eddings* added the "corollary" rule that the sentencer "not refuse" to consider the mitigating evidence as a matter of law. *Id.*, at 114. *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986) involved excluding from evidence, and thus concealing from the jury, facts needed for the full exercise of discretion. *Hitchcock* v. *Dugger*, 481 U. S. 393, 398-399 (1987) involved an instruction that effectively told the jury to disregard a category of mitigating evidence. All of these cases involve a

"*barrier* to the sentencer's consideration of all mitigating evidence . . . ." *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988) (emphasis added). None of these cases cast doubt on the confidence of *McGautha* and *Lockett* that juries will consider the appropriate factors if no barriers are placed in their way.

The purpose of the *Lockett-Eddings* rule is to implement the requirement that "the sentencer is to make an individualized assessment of the *appropriateness* of the death penalty . . . ." See *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) (emphasis added). "Appropriate" and "justified," in this context, are synonymous, and this Court used these words interchangeably in *Sumner* v. *Shuman*, 483 U. S. 66, 78, 85 (1987). Although many states have followed the Model Penal Code and phrased the decision in terms of aggravating and mitigating factors, there is no constitutional requirement that those terms be used. See *Penry*, at 316 (discussing *Jurek* v. *Texas*, 428 U. S. 262 (1976)).

Mitigating evidence, by definition, is evidence that "calls for a sentence less than death." *McKoy* v. *North Carolina*, 494 U. S. 433, 439 (1990) (internal quotation marks omitted). "Calls for," again, is synonymous with "justifies" in this context. The essence of the selection decision has also been expressed as a "reasoned moral response" to the evidence. *Penry*, at 319 (quoting *California* v. *Brown*, 479 U. S. 530, 545 (1987) (O'Connor, J., concurring) (emphasis omitted)). Again, the word "justified" conveys the jury's normative function as the moral representative of the community.

Just as the argument that a state must list mitigating circumstances conflicts with past approval of the Georgia system, see *ante*, at 8-9, so a contention that jury instructions must use the word "mitigation" conflicts with the repeated approval of the Texas system as applied to most cases.

In the original Texas system, the sentence was based on the jury's answers to three "special issues," involving (1) deliberation and expectation death would result; (2) future dangerousness; and (3) provocation, if any, by the victim. See *Jurek*, 428

U. S., at 269 (quoting statute). "The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions *allow* consideration of particularized mitigating factors." *Id.*, at 272 (emphasis added). The first and third factors allow some mitigation relating to the crime itself, such as lack of deliberation or reasonable response to provocation. Any character or background mitigation, however, could only come in through the second issue. *Jurek* held that the system was valid on its face based on the state court's interpretation of the statute "to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." *Ibid.* Conspicuous by its absence from *Jurek* is any requirement that the instructions be altered to discuss mitigation.

The subsequent Texas cases confirm that the system is constitutional so long as it does not erect an actual barrier to the jury's consideration of a mitigating factor. There is no requirement that the instructions discuss mitigation as such. In *Franklin* v. *Lynaugh*, 487 U. S. 164, 177 (1988), the defendant objected that the second special issue did not allow adequate consideration of his good behavior during prior prison terms. The plurality found the argument foreclosed by *Jurek*. *Id.*, at 180. The concurrence held that, under the circumstances of the case, "the jury was *free* to give mitigating effect to this evidence in answering the special verdict question regarding future dangerousness." *Id.*, at 185 (emphasis added). Here again, we see that the requirement is that no barriers be placed in the way of a jury which decides that the evidence calls for a sentence less than death.

Penry was decided differently because, on the facts of the case, "a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty *unwarranted* would be *unable* to give effect to that conclusion" under the first special issue. 492 U. S., at 323 (emphasis added). The second and third issues also provided no basis for favorable answers based on retarda-

tion on the facts of the case. *Id.*, at 323-324. The Virginia instruction would have passed with flying colors in *Penry*. "Justified" is the same as "warranted," and the jury would not only have been *able* to return a life sentence if it believed death was unwarranted based on all the evidence, it would have been expressly *directed* to do so.[4]

Finally, in *Johnson* v. *Texas*, 509 U. S. 350 (1993), a direct review case, this Court rejected a claim considerably stronger than Buchanan's claim in the present habeas case. Johnson's claim was that "the Texas special issues system in effect until 1991 did not allow his jury to give adequate mitigating effect to evidence of his youth." *Id.*, at 352 . Indeed, future dangerousness does not point the jury to the mitigating fact of youth; it requires a bit of stretch and may even cut the other way. See *id.*, at 368; *id.*, at 375 (O'Connor, J., dissenting). That did not render the Texas system unconstitutional as applied. "As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Id.*, at 368 (quoting *Graham* v. *Collins*, 506 U. S. 461, 475-476 (1993)).

There can be no genuine doubt that Virginia's "justified" instruction places all mitigating evidence within the "effective reach" of the jury. To decide otherwise one would have to conclude that the jurors have no moral compass at all. Indeed, it was the conviction that jurors *would* react to mitigating circumstances, even when contrary to their instructions, that was the most convincing ground for the *Woodson* rule in the first place. See *ante*, at 14. Furthermore, the absence of limits in the Virginia instruction means that the "sentencer [is] allowed to give *full* consideration and *full* effect to mitigating circumstances," see 509 U. S., at 381 (O'Connor, J., dissenting)

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4. *Amicus* NADCL interprets *Penry* as striking down the Texas instructions for not being specific enough. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 7, n. 4. On the contrary, the vice of the instruction in *Penry* was that it was *too* specific, as applied to that case, limiting the jury to factors for which Penry's retardation had no mitigating force.

(emphasis in original), which is at least desirable, even though *Johnson* narrowly rejected it as a constitutional requirement. Cf., *id.*, at 372 (majority).

The Virginia instruction not only complies with the letter of *Lockett* as well as other approved instructions, it complies with the spirit better than the pre-1991 Texas system as applied in *Johnson* and upheld as so applied. Unless the entire Texas line of cases is to be overruled, which would surely be a "new rule," this instruction must be upheld as correct on its face.

III. The question of whether the statutory list of "facts in mitigation" should be read to the jury is purely a question of state law.

At the time of Buchanan's trial, Va. Code Ann. § 19.2-264.4B read as follows:

> "B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.
>
> "Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; (v) the age of the defendant at the time of the commission of the capital offense."

In quoting what he deems to be the "relevant" portion of this statute, defendant omits the first two sentences. Brief for Petitioner 11, n. 9. *Amicus* CJLF submits that these sentences are highly relevant. On its face, this statute is a rule of admissibility of evidence and not a standard for jury decision-making, and the court below so held. *Buchanan* v. *Angelone*, 103 F. 3d 344, 348 (CA4 1996), J. A. 206.

The first sentence states the general rule of admissibility of all relevant evidence but expressly excludes presentence reports. Such reports are routinely considered in noncapital sentencing, but have created problems in this context. See *Gardner* v. *Florida*, 430 U. S. 349, 353, 362 (1977). The second sentence defines relevant evidence, incorporating the "all mitigating evidence" rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

The second sentence uses the term "facts in mitigation" to describe a category of admissible *evidence*. The third sentence then fleshes out the definition with a nonexclusive list of several types of mitigating evidence.

Rules of evidence are addressed to judges, not juries. The judge does not typically inform a jury why evidence has been admitted or excluded, except in the limited circumstances where evidence is admissible for one purpose but not for another. See, *e.g.*, *Estelle* v. *McGuire*, 502 U. S. 62, 70-71 (1991). Interpretation of this statute as not requiring a jury instruction listing the factors is a reasonable interpretation. See *LeVasseur* v. *Commonwealth*, 304 S. E. 2d 644, 661 (Va. 1983) (so interpreting statute). In any event, the interpretation by the Virginia Supreme Court is absolutely binding on all federal courts. *Johnson* v. *Fankell*, 520 U. S. ___, 138 L. Ed. 2d 108, 115, 117 S. Ct. 1800, 1804 (1997).

In the court below, defendant argued that failure to instruct the jury with this list denied him a state procedural right in violation of the rule of *Hicks* v. *Oklahoma*, 447 U. S. 343, 346 (1980). See 103 F. 3d, at 348, J. A. 205-206. This was

Question 2 of the certiorari petition, see Pet. for Cert. i, and the grant of certiorari was limited to Question 1. J. A. 216.

Amicus CJLF believes strongly that the sweeping language of *Hicks* needs to be limited. If broadly interpreted, it conflicts with well-established limitations on federal power. Cf. *Estelle* v. *McGuire*, 502 U. S. 62, 71-72 (1991). We have not briefed this important issue in this case, however, because it is not fairly included in the question presented. We would welcome the opportunity to brief it in some future case where it is properly before the Court.

Aside from the *Hicks* issue, this statute raises no federal question in the present case. The state has no federal constitutional obligation to list mitigating circumstances to the jury. See *ante*, at 8-9. The highest court of the state says the statute creates no state-law obligation to do so, and its word on that question is final.

IV. Acceptance of defendant's argument would be a "new rule."

The foregoing argument on the "merits" of defendant's proposed rule also applies to the application of the "new rule" doctrine of *Teague* v. *Lane*, 489 U. S. 288 (1989). A proposition cannot be dictated by precedent, see *id.*, at 301, when the opposite is dictated by precedent. See *Gray* v. *Netherland*, 518 U. S. ___, 135 L. Ed. 2d 457, 475, 116 S. Ct. 2074, 2084 (1996). Further, the congruence of the Virginia instruction with the long-established principles of discretionary sentencing, see *ante*, at 12-19, establish that any contrary rule would not qualify for the extremely narrow second exception to *Teague*. See *Caspari* v. *Bohlen*, 510 U. S. 383, 396 (1994) ("narrow exceptions").

Defendant's proposed rule is contrary to precedent and to principles of sentencing that have been thoroughly considered and long accepted. It would necessarily be a new rule and a nonfundamental rule. It is therefore *Teague*-barred.

V. If defendant is correct, then *Lockett* was wrongly decided and should be overruled.

In the earlier parts of this brief, we have demonstrated how Virginia's instruction is fully consistent with this Court's precedents. The problem runs even deeper than that, however. The core of defendant's argument is his assertion that juries cannot be trusted to decide, without guidance, what factors should weigh against the death penalty in a particular case. See Brief for Petitioner 24. Yet *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and its progeny unequivocally forbid a state from telling jurors which factors do *not* weigh on that side. For example, if a state wanted to decide, as a matter of public policy, that voluntary intoxication is simply not mitigating, it would not be permitted to do so in the penalty phase of a capital case, even though it unquestionably can do so in defining substantive criminal law. Cf. *Montana* v. *Egelhoff*, 518 U. S. ___, 135 L. Ed. 2d 361, 372, n. 4, 116 S. Ct. 2013, 2020-2021, n. 4 (1996) (plurality opinion); *id.*, at 377, 116 S. Ct., at 2024-2025 (Ginsburg, J., concurring in the judgment); *id.*, at 385, 116 S. Ct., at 2031 (O'Connor, J., dissenting); *id.*, at 386, 116 S. Ct., at 2032 (Souter, J., dissenting). On the defendant's side, *Lockett requires* states to allow juries to make up principles of mitigation as they go along. Cf. Brief for Petitioner 24.

The *Lockett-Eddings-Penry* line of cases has not gone unchallenged. See *Lockett*, 438 U. S., at 623 (White, J., dissenting in part); *Walton* v. *Arizona*, 497 U. S. 639, 667 (1990) (Scalia, J., concurring in part and concurring in the judgment); *Graham* v. *Collins*, 506 U. S. 461, 492-495 (1993) (Thomas, J., concurring). If defendant is right that juries cannot be trusted to decide what is mitigating without bringing back the evils of the pre-*Furman* era, then the premise of *Lockett* collapses, and its critics are right. There would then be no legitimate reason for preventing the states from telling jurors what factors are *not* mitigating.

The goal of this entire body of case law is, after all, to avoid discrimination and arbitrariness, not to minimize the number of

death verdicts. See *Graham*, 506 U. S., at 501 (Stevens, J., dissenting). Discrimination in leniency is still discrimination. See *McCleskey* v. *Kemp*, 481 U. S. 279, 336 (1987) (Brennan, J., dissenting). If the jury is to be "channelled," the channel must have two banks.

Either juries can be trusted to decide what factors are mitigating in a particular case or they cannot. If they cannot, *Lockett* and its progeny were wrongly decided and should be overruled. If they can, defendant's claim must be rejected.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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